(6)

{SHOW } PROCEEDINGS AND ORDERS DATE: 051785

CASE NBR 84-1-01291 CSX
SHORT TITLE Park Ave. Inv. & Dev., Inc. DOCKETED: Feb 4 1985
VERSUS Barkheimer, Donald I., et al TIME QUESTION

Date	Proceedings and Orders
Feb 4 1985	Petition for writ of certiorari filed.
Feb 4 1985	Appendix of petitioner Park Ave. Inv. & Dev., Inc. filed.
Feb 4 1985	Above appendix filed in two volumes.
Mar 18 1995	Brief of respondents Donald I. Barkheimer, et al. in opposition filed.
Mar 15 1985	Motion of respondents for attorneys' fees and costs filed.
Mar 20 1985	DISTRIBUTED. April 12, 1985
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 16 1985	Letter from petitioner in compliance with Rule 28.1 filed.
Apr 29 1985	Opposition of petitioner to motion of respondents filed.
May 3 1985	REDISTRIBUTED. May 9, 1985
May 13 1985	Motion of respondents for attorneys' fees and costs DENIED.

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 051785

CASE NBR 84-1-01291 CSX
SHORT TITLE Park Ave. Inv. & Dev., Inc. DOCKETED: Feb 4 1985
VERSUS Barkheimer, Donald I., et al TIME QUESTION

Date	Proceedings and Orders
May 13 1985	Petition DENIED. Separate statement by The Chief Justice with whom Justice Rehnquist and Justice O'Connor join. (Detached opinion.)

****

84-1291

NO.

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute which would require a finding of usury and entry of Judgment for Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully request that a Writ of

Certiorari issue to review the opinions and orders of the Fourth District Court of Appeal of Florida and the Florida Supreme Court. Those decisions enforce the common law in a usury case rather than a state usury statute, which is directly applicable and which would require a finding of usury and entry of judgment in Petitioners' favor, thereby denying Petitioners' constitutional right to equal protection of the law.

RELEVANT OPINIONS AND ORDERS BELOW

A) The trial court's Order Granting Partial Summary Judgment dated January 7, 1983 (Appendix H).

B) The Final Judgment dated January 31, 1983 (Appendix I).

C) The trial court's Order Denying Motion to Set Aside Stipulation (Appendix L).

D) The Fourth District Court of Appeal's Order affirming the trial court citing to *GUNN PLUMBING, INC. V. DANIA BANK*, 252 So.2d 1 (Fla. 1971) (Appendix M).

E) Florida Supreme Court Order Denying Petition for Certiorari (Appendix P).

F) Florida Supreme Court Order Denying Motion for Reinstatement (Appendix V).

JURISDICTION

The decision of Florida's Fourth District Court of Appeal, affirming the Final Judgment of the trial court was entered on May 9, 1984 (Appendix M), and the court's

denial of rehearing was entered July 11, 1984 (Appendix N). Review was thereafter sought in the Florida Supreme Court which court declined to accept discretionary jurisdiction (Appendices O and P), and refused to accept a direct ruling that the Fourth District had not declared invalid a State statute (Appendices Q and R). A Motion for Reinstatement (Appendix S) was denied November 5, 1984 (Appendix V). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court results in the decision of the Fourth District being rendered by the highest court of Florida in which review can be had. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1

STATUTORY PROVISION INVOLVED

The statute involved is §687.071 Florida Statutes, which provides in pertinent part:

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

(7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

STATEMENT OF THE CASE AND FACTS

Respondent (the "Lenders") loaned money to Petitioners (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by the Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (Appendix J). The effective interest rate for the transaction was 495.3% per annum (Appendix J). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (Appendix J). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (Appendix J). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (Appendix J). These loans are but examples of the many loans made to the Borrowers by the Lenders and now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for nonpayment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of each of the usurious notes, plus interest (Appendix A). The Stipulation also provided that repayment of the usurious notes and interest was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (Appendix A).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed in the Hotel and Resort (Appendix A). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (Appendix B). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (Appendices B and C). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (Appendix D). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (Appendix E). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (Appendix F). In response, the Borrowers filed a Motion to Set Aside the Stipulation in both the action filed to enforce the Stipulation, and in the original court action in which the Stipulation had been entered, on the ground that the Stipulation was usurious and unenforceable under §687.071 F.S., Florida's Criminal Usury Statute, which provides in pertinent part:

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

(7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (Appendices G, H, and I).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation. It is important to note that the court did not make a determination that the notes were not usurious. Rather the court made the assumption that they were, but nonetheless decided that the usury had been purged by entry into a new, independent and separate obligation (the Stipulation), citing to *GUNN PLUMBING, INC. V. DANIA BANK,* 252 So.2d 1 (Fla. 1971) which incorporated the common law principle pertaining to purging usury (Appendix K).

> *...irrespective of the usurious nature of the notes* which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate

> obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of the State of Florida, as dictated by §687.071(7) refused to allow a usurious loan to be enforced in the Florida courts of this state. In affirming, the Fourth District Court of Appeal found the common law set forth in the *GUNN PLUMBING* decision controlling, rathaer than the Florida Statute, §687.071, thus depriving Petitioners of the equal protection of the law. One Judge dissented, without opinion.

Petitioners arguments before the Fourth District Court of Appeal raised the arguments here presented but were rejected by that Court, by its reliance upon *GUNN PLUMBING.*

The Borrowers filed a Petition for Certiorari with the Florida Supreme Court which was denied (Appendices O and P), and a direct appeal contending that the Fourth District had inherently held §687.071(7) invalid, as applied to this case (Appendix Q). The Florida Supreme Court dismissed the direct appeal, finding that it did not appear that the Fourth District had declared the Statute invalid. The Dismissal was subject to reinstatement if jurisdiction was established upon proper motion (Appendix R). Petitioners filed a Motion for Reinstatement (Appendix S),

which was denied (Appendix V). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court resulted in the Fourth District being the highest court of Florida in which review could be had.

REASONS FOR GRANTING THE WRIT

This case presents squarely and unequivocally the issue of the right of a state, under the Equal Protection Clause of the Fourteenth Amendment, to provide dissimilar treatment for Petitioners by failure to apply §687.071(7) F.S. which prohibits, without qualification or condition, enforcement of a usurious transaction in the State of Florida. In *FERRIS V. FROHMAN,* 32 S.Ct. 263, 223 U.S. 424, 56 L.Ed 492 (1912) this Court held that where a decision of a state court enforcing common law rights violated a federal (here constitutional) right it was reviewable by certiorari and reversible.

In 1969 Florida's Criminal Usury Statute was amended to provide in §687.071(7) that a usurious loan would not be an enforceable debt in the State of Florida. The trial court and the Fourth District failed to apply the statute. Both courts relied upon the prior decision in *GUNN PLUMBING,* which incorporated common law principles. §687.071 F.S. was controlling. The statute was enacted in 1969, and the promissory notes involved in *GUNN PLUMBING* were executed prior to that date, so the statute was not applicable to, nor discussed in, *GUNN PLUMBING.* §687.071 encompasses the public policy of the state of Florida as of 1969. The statute protects Florida citizens who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This

statutory provision which was passed to strengthen Florida's usury laws is not subject to waiver and cannot be held inapplicable under a "purging" theory.

COMMON LAW PRINCIPLES CANNOT BE APPLIED TO EMASCULATE §687.071

GUNN PLUMBING essentially stands for two propositions: a usurious contract can be purged by usury by a new contract where the old obligation is abandoned and a new one is entered into free from the vice of the old; and the defense of usury can be waived by virtue of entering into a later contract.[1]

The common law principles set forth in *GUNN PLUMBING* are not applicable to this case for several

[1] In the present case, unlike *GUNN PLUMBING* the old usury was carried forward into the new contract. The Stipulation entered into by the parties specifically set forth the amount owed each of the lenders *under the old usurious notes* (Appendix A). The Stipulation then merely set forth a new payment arrangement, but the old obligations continued. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, under *GUNN PLUMBING* the new Stipulation was clearly tainted by the old usury.

The court in *GUNN PLUMBING* also relied upon the fact that the borrowers took no affirmative action to rescind, reform or void the terms of the settlement stipulation. The Borrowers in the present case did so, by filing Motions to Set Aside the Stipulation in both the original action wherein the Stipulation was entered, and in the later suit to enforce the Stipulation.

GUNN PLUMBING also held that the settlement agreement entered into by the parties *specifically* provided that the defense of usury raised by the borrower was being withdrawn and that the borrowers admitted they had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. The Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury. In the present case the borrowers did not waive their usury defense by any language in the Stipulation.

reasons. First, those common law principles cannot be used to emasculate the clear public policy of the State of Florida as set forth in §687.071(7) that no usurious contract will be enforced in the State of Florida. In *CRAWFORD V. CARLTON,* 422 NYS 2d 402 (Sup. Ct. 1979) the court held that a statute which provides that the return of excess interest is a bar to further penalties cannot be used or construed to emasculate a later statute providing that usurious contracts are void. As applied to this case it can be said that Florida's common law decisions dealing with purging usury by a new contract or waiving usury cannot be used to emasculate §687.071(7) F.S. which provides that no usurious contracts will be enforced in Florida.

Nor can Florida's Criminal Usury Statute, §687.071, be waived. Rights granted by a statute cannot be waived where the statute is intended to protect the general rights of the public. *HALSRUD V. BRODALE,* 247 Iowa 273, 72 N.W. 2d 94 (1955); *WELLENS V. BECK,* 103 N.W. 2d 281 (N.D. 1960). Requirements of a statute enacted for the public good cannot be nullified or varied by private contract. *SCHOOL DISTICT V. TEACHER'S RETIREMENT FUND ASSN.,* 163 Or. 103, 95 P.2d 720, 96 P.2d 419 (1939); *GRANDVIEW INLAND FRUIT CO., HARTFORD, F. INS., CO.,* 189 Wash. 590, 66 P.2d 827 (1937). Florida has specifically held that the doctrine of waiver does not apply in transactions that are forbidden by statute or that are contrary to public policy. *SHERBA BROS., INC. V. CAMPBELL,* 361 So.2d 814 (Fla. 4th DCA 1978); *MONTSDOCA V. THE HIGHLANDS BANK & TRUST CO.,* 85 Fla. 158, 95 So. 666 (1923).

CONCLUSION

The Orders and opinions of the courts of the State of

Florida clearly deprive Petitioners of the right to equal protection since they improperly apply common law principles dealing with purging usury and waiver, rather than Florida's Criminal Usury Statute. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 84-1291

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In the Supreme Court of the United States

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v.

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOL. I — APPENDICES A - H

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APPENDIX "A"
COMPLAINT with attached STIPULATION

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CIVIL DIVISION
CASE NO. 823158 CA(L)01 E

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD I. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOS. D. FARISH, JR. and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Defendants

COMPLAINT

The Plaintiffs, DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD I. BARKHEIMER, G. LOUISE BARKHEIMER, his wife,

HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOS. D. FARISH, JR. and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI, sue the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually, and allege:

COUNT I.

1. This is an action for declaratory relief under Chapter 86 of the Florida Statutes.

2. PARK AVENUE INVESTMENT & DEVELOPMENT, INC. is a Florida corporation with its principal office in Palm Beach County; it was doing business as a management company for Barefoot Mailman Resort and Hotel until sometime recently. Its initial directors were Everett Hensley, Ralph B. Snelgrove, Drew C. Apgar and Mark Losee.

3. BAREFOOT MANAGEMENT COMPANY is a Florida corporation doing business in Broward County as a management company for the Barefoot Mailman Hotel and Resort.

4. The BAREFOOT MAILMAN OWNERS ASSO-

CIATION, INC. is a Florida non-profit organization with its principal office in Palm Beach County. The initial officers of the BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. were Mark E. Losee, Ralph B. Snelgrove, Drew C. Apgar, and Everett R. Hensley.

5. The BAREFOOT MAILMAN, LTD. is a Florida limited partnership with its principal office in Palm Beach County, Florida, and is doing business in Broward County converting the Barefoot Mailman Hotel into the Barefoot Mailman Hotel and Resort, a timeshare ownership resort.

6. CAXTON, LTD. is an alien corporation holding a mortgage on the real property described herein known as Barefoot Mailman Hotel and Resort.

7. MARK E. LOSEE is a resident of Palm Beach County, Florida.

8. DREW C. APGAR is a resident of Palm Beach County, Florida.

9. On or about November 14, 1979, MARK E. LOSEE, EVERETT R. HENSLEY, RALPH B. SNELGROVE, and DREW C. APGAR formed a limited partnership named BAREFOOT MAILMAN, LTD., for the purpose of purchasing the Barefoot Mailman Hotel and converting that hotel into timeshare interests for sale. This property is located in Broward County, Florida, and is legally described as follows:

> All that part of GOVERNMENT LOT 4 in SECTION 17, TOWNSHIP 48, SOUTH, RANGE 43 EAST, lying between a line parallel to and 3200 feet south of (measured at right angles) the north

line of said SECTION 17, in a line parallel to and 3500 feet south of (measured at right angles) the said north line of SECTION 17, lying east of the easterly right-of-way of the intracoastal waterway; subject to the right-of-way of State Road A1A, as now located and constructed. LESS AND EXCEPT therefrom that portion of the described parcel lying west of the westerly line of the right-of-way of State Road A1A as now located and constructed.

10. The Defendant, BAREFOOT MAILMAN, LTD., transferred the above described real property to BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. by deed recorded on May 20, 1980, in the Official Records of Broward County, Florida, in Official Record Book 8924, page 48.

11. By agreement dated February 29, 1980, the BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. entered into a Management Contract with PARK AVENUE INVESTMENT & DEVELOPMENT, INC. whereby the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC. was employed to manage the development and marketing of the timeshare project known as Barefoot Mailman Hotel and Resort.

12. The Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., DREW APGAR and MARK LOSEE, solicited from the Plaintiffs, DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD I. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, and GENEVA L. BARKHEIMER (hereafter Original Plaintiffs), monies to be invested into

the Barefoot Mailman Hotel and Resort under a profit sharing plan.

13. The Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., defaulted under this profit sharing plan and executed promissory notes to the Original Plaintiffs for the deficiency due the Original Plaintiffs under the profit sharing investment plan.

14. The Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., defaulted under these promissory notes and actions were brought by the Original Plaintiffs in the Circuit Court of Palm Beach County to recover under these notes and to recover attorneys' fees. On or about September 17, 1981, a Stipulation was entered into between the Original Plaintiffs and the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., MARK LOSEE and DREW APGAR, for settlement of the above referred to cases. A copy of this Stipulation is attached hereto as Exhibit A.

15. Under the terms of this Stipulation, the total claim of the Original Plaintiffs was set forth and a payment plan was agreed to. Under Paragraph 5 of this Stipulation, the claims of the Plaintiffs and their attorneys' fees to Plaintiffs, ROBERT V. ROMANI and JOS. D. FARISH, JR., were secured by timeshare unit weeks at the Barefoot Mailman Hotel and Resort. These unit weeks for security were to be conveyed free of encumbrances to the Plaintiffs in the manner set forth in the Declaration of Restrictions, Articles of Incorporation and By-Laws of the BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. The Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., MARK LOSEE and DREW APGAR, in their corporate and individual capacity,

warranted that the vacation share conveyances were executed with full authority of BAREFOOT MAILMAN, LTD. and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC.

16. At the time this Stipulation was entered into, the Defendant, MARK LOSEE, was a general partner in BAREFOOT MAILMAN, LTD., and President of BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., and PARK AVENUE INVESTMENT & DEVELOPMENT, INC. The Defendant, DREW APGAR, was a general partner in BAREFOOT MAILMAN, LTD. and Secretary of BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. and PARK AVENUE INVESTMENT & DEVELOPMENT, INC. These Defendants had the authority as officers of these corporations and general partners to transfer these vacation share units to the Plaintiffs as security for the debt of PARK AVENUE INVESTMENT & DEVELOPMENT, INC. and so represented they had this authority to the Plaintiffs.

17. These vacation share conveyances were to be held in escrow by the Original Plaintiffs' attorneys. In the event that the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., defaulted under the terms of the Stipulation, the vacation share conveyances were to become immediately effective, and the Plaintiffs were to become entitled to all of the rights of unit owners.

18. This Stipulation was recorded on September 23, 1981, in Official Record Book 9808 at Page 33, of the Official Records of Broward County, Florida.

19. Along with the conveyance of the vacation share conveyances, a sample of the non-disturbance certificate

was transferred, executed by the Defendants, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., BAREFOOT MAILMAN, LTD., and CAXTON, LTD., as the mortgagee, for the benefit of all the unit owners. This non-disturbance certificate was recorded on November 19, 1981, at Official Record Book 9900 at Page 333, Official Records of Broward County, Florida.

20. A copy of the vacation share conveyance to DONALD BARKHEIMER and LOUISE BARKHEIMER is attached hereto as Exhibit "B". A copy of the vacation share conveyance to JOS. D. FARISH, JR. and ROBERT V. ROMANI is attached hereto as Exhibit "C". A copy of the non-disturbance certificate is attached hereto as Exhibit "D".

21. The Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., failed to make any of the payments agreed to under the Stipulation.

22. Under the terms of the Stipulation, the Plaintiffs became entitled to all of the rights of a unit owner of the Barefoot Mailman Hotel and Resort as set forth in Declaration of Restrictions, Articles of Incorporation and By-Laws of the BAREFOOT MAILMAN OWNERS ASSOCIATION, INC.

23. The Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, and CAXTON, LTD., have demanded that the Plaintiffs deliver all the unit weeks of the Barefoot Mailman Hotel and Resort which they received as security for the stipulated payment plan. The Defendant, BAREFOOT MANAGEMENT COMPANY, has denied the Plaintiffs entry to the units during their allotted weeks under the vacation share

conveyances, under the theory that the vacation share conveyances to the Plaintiffs were invalid.

24. These vacation share conveyances were conveyed properly pursuant to the Declaration of Restrictions, Articles of Incorporation and By-Laws of the BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., and with full knowledge of the Defendant, CAXTON, LTD.

25. There is an actual controversy as to the rights of the Plaintiffs under these vacation share conveyances and as to the rights of the Plaintiffs to possess the units during the weeks provided under the vacation share conveyances.

26. The Plaintiffs have retained the undersigned counsel and agreed to pay them a reasonable fee for their services.

WHEREFORE, Plaintiffs request this Court to declare and construe the Plaintiffs' rights as owners of vacation share interests in the Barefoot Mailman Hotel and Resort and such other relief as may be appropriate to adjudge and declare all the rights of the parties to this action, including costs and attorneys' fees, and for trial by jury as to those issues so triable.

COUNT II.

27. The Plaintiffs reallege and incorporate herein each and every allegation of Count I.

28. As part of the Stipulation between the Original Plaintiffs and the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., the Defendants, MARK LOSEE and DREW APGAR, represented to the

Plaintiffs that the vacation share conveyance certificates conveyed to the Plaintiffs as security for the payment of the indebtedness of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., and attorneys' fees incurred, were properly executed with full authority of the conveying entities, BAREFOOT MAILMAN, LTD. and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. See Paragraph 5 of the Stipulation.

29. The Defendants, DREW APGAR and MARK LOSEE, also represented to the Plaintiffs that CAXTON, LTD., the mortgagee of the vacation share project known as Barefoot Mailman Hotel and Resort, had knowledge of, and consented to, the conveyance of these vacation share units as security to the Plaintiffs for the indebtedness of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC.

30. The Plaintiffs are entitled to the exclusive use and possession of those vacation units transferred in their vacation share conveyances during those times referred to on the schedule of weeks attached to each vacation share conveyance.

31. The Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, and CAXTON, LTD., have denied the Plaintiffs possession of and entry to these vacation share units during their allotted time since about February 25, 1982. Since that date, the Defendants have unlawfully withheld, and still unlawfully withhold, possession of their allotted vacation units to the Plaintiffs.

32. By reason of the Defendants' unlawful withholding of possession to these vacation units, the Plaintiffs

have been deprived of rents and profits therefrom and will be so deprived in the future.

33. The Defendants have rented, reconveyed, or used for their own benefit those vacation units conveyed to the Plaintiffs during those weeks when the Plaintiffs were entitled to possession.

34. The Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., and BAREFOOT MANAGEMENT COMPANY, have converted these vacation share units to their own use to the damage of the Plaintiffs.

35. The taking and conversion of said vacation share units by the Defendants was done wilfully and maliciously with a reckless disregard for the rights of the Plaintiffs.

WHEREFORE, the Plaintiffs request this Court for the following relief:

A. For a preliminary and permanent injunction requiring the Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, and CAXTON, LTD., to permit the Plaintiffs to use and possess those vacation units during those times when the Plaintiffs are entitled to possession under their vacation share conveyance from the Defendants, BAREFOOT MAILMAN, LTD. and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC.

B. For an accounting of those rents and profits that the Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, and CAXTON, LTD., have derived from their use or from any conveyance that they have made to others of the vacation share units

during those weeks that the Plaintiffs were entitled to possession, and for a judgment against those Defendants in favor of the Plaintiffs for those rents and profits so derived.

C. For a judgment against the Defendants, BAREFOOT MANAGEMENT COMPANY, BAREFOOT MAILMAN, LTD., and CAXTON, LTD., for damages for rents and profits of which the Plaintiffs were deprived, as the result of the Defendants' unlawful withholding of possession from the Plaintiffs of their vacation share units during those weeks the Plaintiffs were entitled to possession.

D. For any and all equitable relief which this Honorable Court deems proper.

E. For punitive damages in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

F. Trial by jury.

COUNT III.

36. Plaintiffs reallege and incorporate herein all allegations of Count I and II.

37. On September 17, 1981, the Original Plaintiffs and the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., through its President, MARK LOSEE, and DREW APGAR, entered into a written Stipulation wherein the Original Plaintiffs agreed to accept periodic payments from the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., for monies due the Original Plaintiffs under promissory notes

executed by the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., in lieu of obtaining judgment against the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC. The Stipulation is attached hereto as Exhibit A.

38. As security for the Original Plaintiffs' agreement to accept periodic payments of the monies due the Plaintiffs from PARK AVENUE INVESTMENT & DEVELOPMENT, INC., the Original Plaintiffs accepted conveyances of vacation share unit weeks at the Barefoot Mailman Hotel and Resort. These conveyances were evidenced by the vacation share conveyance certificates attached hereto as well as a non-disturbance certificate executed by the Defendant, CAXTON, LTD. The Original Plaintiffs' attorneys, ROBERT V. ROMANI and JOS. D. FARISH, JR., accepted conveyances of vacation share units as security for payment of their attorneys' fees. These certificates of vacation share conveyances are attached as Exhibits B and C.

39. The Defendant, MARK LOSEE, as President, and the Defendant, DREW APGAR, as Secretary of the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., and as general partners in BAREFOOT MAILMAN, LTD., had the authority to convey these vacation share units as security for the indebtedness of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., the managing and marketing entity of the timeshare project known as Barefoot Mailman Hotel and Resort. The BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. was the owner and BAREFOOT MAILMAN, LTD. was the developer of this timeshare project.

40. These vacation share conveyances were to be held by the Original Plaintiffs' attorney in escrow, pending the Defendant's, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., complying with the Stipulation Agreement.

41. In the event of default by the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., under any of the terms of the Stipulation Agreement, the Plaintiffs were to become entitled to all the rights and benefits of unit owners of the vacation share units evidenced by the vacation share conveyance certificates.

42. The Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., failed to pay the initial installment of $10,000.00 due on September 21, 1981, under this Stipulation Agreement and every payment due thereafter.

43. The Plaintiffs demanded payment from the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., but the Defendant has failed and refused to pay.

44. Plaintiffs have retained the undersigned counsel and agreed to pay them a reasonable fee for their services.

WHEREFORE, Plaintiffs demand the following relief:

A. A lien be placed upon the vacation share conveyances in favor of the Plaintiffs in the amount of their claim against the Defendant.

B. That this Court order that the vacation share

conveyance certificates held by the Plaintiffs as security be sold either by private sale by the Plaintiffs or public sale by this Court.

C. That the proceeds of such sale be applied toward satisfaction and payment of the Plaintiffs' lien, the costs of the sale and a reasonable attorneys' fee under §679.504, Florida Statutes.

D. That judgment be rendered against the Defendant for any deficiency that may arise after such sale.

E. That the Plaintiffs have such other and further relief as may be proper.

F. Trial by jury.

/s/ Mikel D. Greene
Mikel D. Greene
of Counsel

FARISH, FARISH & ROMANI
Denco Building
316 First Street
West Palm Beach, Florida 33402
Attorneys for Plaintiffs
(305) 659-3500

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

NO. 81-2952CA(L)01 J

DONALD I. BARKHEIMER II, and PEGGY A. BARKHEIMER, his wife

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendant.

NO. 81-2953CA(L)01 J

DONALD I. BARKHEIMER and G. LOUISE BARKHEIMER, his wife,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendant.

NO. 81-2954CA(L)01 J

HARRY RANKER and VIRGINIA RANKER, his wife,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendant.

NO. 81-2955CA(L)01 J

DENNIS REED and SANDRA REED, his wife,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendant.

NO. 81-2956CA(L)01 J

GENEVA L. BARKHEIMER,

Plaintiff,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendant.

STIPULATION

The parties, hereby stipulate and agree that it is in the best interests of all concerned to settle the above styled matter without the necessity of protracted litigation and its costs. To this end, the following agreements shall be accepted by the parties as a resolution of the issues necessarily involved in the captioned cases and any judgments flowing therefrom:

1. The total claim of the Plaintiffs, including interest as of September 10, 1981, is as follows:

DONALD I. BARKHEIMER II and PEGGY A. BARKHEIMER, his wife	$28,950.52

DONALD I. BARKHEIMER and G. LOUISE BARKHEIMER, his wife	$156,383.15
HARRY RANKER and VIRGINIA RANKER, his wife	$28,609.12
DENNIS REED and SANDRA REED, his wife	$8,269.53
MICHELLE BRITTON	$2,171.13
WILLIAM BARKHEIMER and RUTH BARKHEIMER	$2,439.31
TOTAL	$226,822.76

2. The method of paying the claims shall be periodic installments as follows:

a) The sum of $10,000.00 paid by the Defendant to the Plaintiffs no later than September 21, 1981 at or before 5:00 p.m. by Certified or Cashier's check.

b) The sum of $25,000.00 paid quarterly, commencing October 10, 1981 and continuing thereafter until Defendant's obligations to Plaintiffs and their attorney are fully satisfied.

c) 10% of the net room rental income from unsold timesharing residences based on assignments from PARK AVENUE MANAGEMENT, INC. to Defendant and Plaintiffs.

d) 6% of the gross purchase price, exclusive of closing costs, on all on-site sales at the Barefoot Mailman Hotel and Resort related to timesharing residential uses commencing October 1, 1981, by virtue of a marketing contract providing

for the payment for consulting services in the amount of the said 6%.

e) Plaintiffs shall have the right to inspect any and all records at reasonable times and places to verify rental income and sales,

3. All sums required herein shall be paid by Defendant to the Plaintiffs c/o Robert V. Romani, Esq., 316 First Street, West Palm Beach, Florida 33401, and shall be divided according to the following percentages:

I. 13% of the payment to Donald I. Barkheimer II and Peggy A. Barkheimer, his wife

II. 68% of the payment to Donald I. Barkheimer and G. Louise Barkheimer, his wife

III. 13% of the payment to Harry Ranker and Virginia Ranker, his wife

IV. 4% of the payment to Dennis Reed and Sandra Reed, his wife

V. 1.0% of the payment to Michelle Britton

VI. 1.0% of the payment to William and Ruth Barkheimer

4. Plaintiffs shall give Defendant a discount of 10% of the then existing balance if payment is made in full.

5. The payments provided hereinabove and for attorneys' fees as set forth in Paragraph 9 shall be secured by vacation-share unit weeks at the Barefoot Mailman Hotel & Resort as shown on schedules A and B. These unit weeks shall be conveyed free of encumbrances to Plaintiffs and

their attorneys no later than October 2, 1981 in the manner set forth in the Declarations of Restrictions, Articles of Incorporation and By-Laws of the Barefoot Mailman Homeowners Association, Inc. and shall be evidenced by a "VACATION SHARE CONVEYANCE" certificate as set forth in the by-laws, together with a non-disturbance certificate relative to unit weeks in attached schedules. So long as these units are held as security, Plaintiffs and their attorney shall not be responsible for any assessments or other common expenses for said units.

By signing this agreement, Defendant and its President and Secretary, individually, warrants that these conveyances have been properly executed with full authority of the conveying entity and that the grantor does, in fact, have proper title to these units and proper authority to execute non-disturbance certificates.

The aforedescribed conveyances of vacation share unit weeks shall be held in escrow by Plaintiff's attorney. In the event that the Defendant defaults under any of the terms and conditions set forth herein the parties agree that the conveyances of unit weeks shall become immediately effective and shall be recorded in the public records in and for Broward County, Florida. Plaintiffs and their attorney shall thereupon become entitled to all the rights of a unit owner as set forth in the Declaration of Restrictions, Articles of Incorporation and By-Laws of the Barefoot Mailman Homeowners Association, Inc.

The parties further agree that judgment may be entered against Defendant without further notice or hearing for all sums then due and owing after deducting the value of the security and payments and income derived by Plaintiffs or their attorneys pursuant to the terms of this

agreement. Affidavit of the Plaintiffs or their attorneys shall be sufficient evidence upon which the Court can enter judgment.

6. The unit weeks designated as security may be used by the secured party free of any common assessments or expenses pending full satisfaction of Defendant's obligations under this agreement. However, any rental income derived by the secured party from renting said units to third parties shall be deducted from Defendant's obligations. The secured party shall be entitled to trade unit weeks set forth in Schedules A and B for personal use as determined by the availability of other comparable units.

7. Any remaining unit weeks available after satisfaction of the claim shall be considered the property interest of the Defendant.

8. In the event the lessee of the restaurant and lounge called "Charley Brown's" at the Barefoot Mailman Hotel & Resort decides to exercise its option to purchase such restaurant and lounge, the value of any chattel mortgage payments or periodic payments under the purchase terms shall be additional security to this agreement subject to the interest of the mortgagee for the real property until the claim of Plaintiffs is discharged according to the terms of this Stipulation. It is contemplated that the Defendant shall not receive in excess of $100,000.00 cash from the sale of the restaurant and lounge and that there will be an approximate $150,000.00 mortgage. In the event, however, that Defendant receives in excess of $100,000.00 cash, that sum shall be used toward satisfaction of Defendant's obligations to Plaintiffs as set forth in this agreement.

9. Defendant agrees to pay Plaintiffs' attorney,

Robert V. Romani, Esq., the sum of $75,500.00 attorneys' fee in this matter. In the event, however, that Defendant pays $32,500.00 prior to January 1, 1982 and $32,500.00 on or before March 30, 1982, the total fee shall be $65,000.00.

10. The attorneys' fee set forth above shall be secured by unit weeks shown on Schedule B. Said unit weeks shall be conveyed to Jos. D. Farish, Jr., Esq. and Robert V. Romani, Esq., d/b/a Farish, Farish & Romani, subject to all the terms and conditions of Paragraphs 5, 6, and 7 of this Stipulation as if those provisions were fully set forth in this paragraph.

11. It is agreed between the parties and the counsel for Plaintiffs that out of each payment made by Defendant to Plaintiffs one-third (⅓rd) shall be deducted toward satisfaction of attorneys' fees until such time as said fees are paid in full. Thereafter, all payments shall be applied toward the reduction of defendant's obligation to Plaintiffs.

12. The parties agree that the court shall retain jurisdiction of the parties and this cause for the purpose of enforcing the terms of this agreement.

13. In any action to enforce the terms of this agreement, the prevailing party will be entitled to reasonable attorneys' fees and costs, including those for appellate proceedings.

14. This agreement shall be binding on the parties and their heirs, successors or assigns. This agreement shall be recorded in the public records of Broward County, Florida, and shall constitute a lien, to the extent of the obligation set forth herein, on the land situate in Broward

County, Florida, to-wit:

1061 Hillsboro Mile, Hillsboro Beach, Florida (as more fully described in the survey at page B-1 et.seq. of the circular of "The Barefoot Mailman")

DATED this 17th day of September, 1981.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC.

Corporate Seal

BY: /s/ Signed
President

/s/ Signed

Attest:

/s/ Signed
Witnesses as to President and Secretary

/s/ Signed
Secretary

/s/ Signed

/s/ Signed
Donald I. Barkheimer II

/s/ Signed
Witnesses as to Donald I. Barkheimer II and Peggy A. Barkheimer

/s/ Signed
Peggy A. Barkheimer, his wife

/s/ Signed

/s/ Signed
Donald I. Barkheimer

/s/ Signed
Witnesses as to Donald I. Barkheimer and G. Louise Barkheimer, his wife

/s/ Signed
G. Louise Barkheimer, his wife

/s/ Signed

/s/ Signed
Harry Ranker

/s/ Signed
Witnesses as to Harry Ranker and Virginia Ranker, his wife

/s/ Signed
Virginia Ranker, his wife

/s/ Signed

/s/ Signed
Dennis Reed

/s/ Signed
Witnesses as to Dennis Reed and Sandra Reed, his wife

/s/ Signed
Sandra Reed, his wife

/s/ Signed

/s/ Signed
Michelle Britton

/s/ Signed
Witnesses as to Michelle Britton

/s/ Signed

/s/ Signed
William Barkheimer

/s/ Signed
Witnesses as to William Barkheimer

/s/ Signed

/s/ Signed
Ruth Barkheimer

/s/ Signed
Witnesses as to Ruth Barkheimer

/s/ Signed

/s/ Signed
Robert V. Romani, Esq.
Attorney for Plaintiffs

/s/ Signed
Witnesses as to Robert V. Romani

SCHEDULE A

The following unit weeks shall secure payment due Plaintiffs as set forth in Paragraph 1 of this Stipulation:

1. Unit 214 WEEKS 1 through 5 Market Value $47,500.00

2. Unit 215 WEEKS 2 through 6 Market Value 48,000.00

3. Unit 219 WEEKS 1 through 3 Market Value 27,600.00

4. Unit 203 WEEKS 1 through 5 Market Value 52,200.00

5. Unit 303 WEEKS 1 through 5 Market Value 52,200.00

SCHEDULE B

The following unit weeks shall secure payment of the attorneys' fees stated in Paragraph 9 of this Stipulation:

1. Unit 124 WEEKS 1 and 2 Market Value $23,600.00

2. Unit 224 WEEKS 2, 3 and 10 Market Value 35,400.00

3. Unit 202 WEEKS 9 Market Value 12,800.00

4. Unit 324 WEEKS 2 Market Value 12,400.00

APPENDIX "B"

AFFIRMATIVE DEFENSE

Defendants PARK AVENUE INVESTMENT & DEVELOPMENT, INC., MARK LOSEE, and DREW APGAR allege as an Affirmative Defense the following:

1. The stipulation upon which the present is based was a consolidation of the various instruments upon which actions no. 81-2952 CA(L) 01 J, 81-2953 CA(L) 01 J, 81-2954 CA(L) 01 J, 81-2955 CA(L) 01 J, and 81-2956 CA(L) 01 J were founded. Those instruments were the reduction to promissory notes of a series of prior promissory notes. The sum total of the amounts claimed when juxtaposed with the amounts actually paid in by the Plaintiffs show that the stipulation and all previous instruments constitute usurious loans with interest exceeding 45%, which rate was wilfully and knowingly charged. Said loans constitute criminal usury and are void pursuant to the provisions of Florida statute 687.071.

2. Defendants were forced to agree to the usurious payments to Plaintiffs throughout their transactions because Plaintiffs realized that Defendants were unable to repay the full amount paid in by Plaintiffs and Plaintiffs threatened to destroy the time share development known as The Barefoot Mailman by filing suit for outstanding amounts unless Defendants agreed to pay usurious rates of interest.

APPENDIX "C"

COUNTERCLAIM

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

COUNTERCLAIM

COUNT I

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues Plaintiffs DONALD I. BARKHEIMER, II, and PEGGY BARKHEIMER, hereinafter referred to as Barkheimers II, and states:

1. On February 20, 1981, in Palm Beach County, Florida, the Barkheimers II loaned to Park Avenue the sum of $20,000. It was agreed between the parties at that time that Barkheimers II would be repaid the $20,000. plus

$3,800. interest within fourteen days. An agreement to this effect was prepared but has been misplaced. The effective interest rate for this transaction was 495.3% per annum.

2. Park Avenue did not pay the $23,800. but instead on March 4, 1981, a new note was signed by Park Avenue with the principal amount of $23,800. and additional interest of $4,370. for a total repayable amount of $28,170. This amount was to be repaid within fourteen days. The interest of $4,370. on the principal amount of $23,800. payable within fourteen days comprises an effective interest rate of 478.7% per annum. A copy of said promissory note is labeled Exhibit 1, attached hereto and by reference made a part of this Counterclaim.

3. The $28,170. was not repaid. Instead, on March 17, 1981, a new note was entered into for a principal amount of $28,170. which was the principal and accrued interest on the prior loan plus interest in the amount of $5,381.18, the total amount payable within fourteen days of the date of said note. The total repayable amount at that time was $33,551.18. The interest payment of $5,381.18 on the principal of $28,170. is an effective interest rate of 498% per annum. The total amount repayable in principal and interest became $33,551.18. A copy of said note is labeled Exhibit 2, attached hereto and by reference made a part of this Counterclaim.

4. On March 30, 1981, Park Avenue paid to Barkheimers II the amount of $14,161. On the same date a new note was executed to Barkheimers II in the amount of $28,025.90. A copy of said promissory note is labeled Exhibit 3, attached hereto and by reference made a part of this Counterclaim. At no time did Barkheimers II ever give to Park Avenue any sum in addition to the $20,000. paid

on February 20, 1981. The promissory note of March 30, 1981 which is $8,025.90 over and above the $20,000. paid by Barkheimers II when coupled with the $14,161. paid to Barkheimers II comprises a total of $22,186.90 over and above the $20,000. paid by Barkheimers II, and constitutes interest. This interest was either paid or accrued during the time period from February 20, 1981 to March 30, 1981 and is approximately 1,000% interest per annum.

5. The March 30, 1981 promissory note was the subject of the complaint in Case No. 82-2952 CA(L) 01 J, and was incorporated in the stipulation which is the subject matter of Counterdefendants' complaint in this cause.

6. Barkheimers II were well aware that the interest being charged was well in excess of 18%.

7. Of the $14,161. paid to Barkheimers II, $13,551. constituted interest.

8. Pursuant to the provisions of 637.04 Florida Statutes Park Avenue is entitled to judgment to twice the interest paid or $27,102.

9. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

WHEREFORE, Park Avenue demands judgment against Barkheimers II in the amount of $27,102. plus interest, costs and attorneys fees.

COUNT II

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues DONALD BARKHEIMER and LOUISE BARKHEIMER, hereinafter referred to as Barkheimers I, and states:

10. Barkheimers I loaned to Park Avenue, in Palm Beach County, Florida, the following sums on the following dates:

1/15/81	$75,000.00
1/30/81	10,000.00
2/3/81	21,000.00
2/20/81	5,000.00
2/25/81	22,000.00
Total	$133,000.00

11. Barkheimers I and their assigns Michelle Britton and Paul Britton were repaid the following sums on the following dates:

1/17/81	$ 750.00
2/13/81	11,900.00
2/13/81	1,900.00
2/13/81	1,900.00
2/13/81	1,200.00
2/13/81	800.00
2/13/81	190.00
2/25/81	1,900.00
2/25/81	1,900.00
2/25/81	190.00
3/13/81	5,950.00
3/30/81	11,155.28
3/30/81	3,237.10
3/30/81	4,045.00

4/13/81		8,025.00
4/13/81		2,000.00
4/17/81		2,012.00
5/6/81		3,158.00
	Total	$62,217.38

12. Of these payments to Barkheimers I, only $20,000. constituted repayments to principal. The balance constitute interest payments.

13. Between January and April, 1981, Park Avenue executed a series of promissory notes in favor of Barkheimers I.

14. On July 2, 1981, suit was instituted by Barkheimers I against Park Avenue for collection of the various monies claimed to be owed to them pursuant to the above related transactions.

15. On September 10, 1981, the parties entered into a stipulation which is the subject matter of this lawsuit wherein the amount agreed upon to be paid to Barkheimers I was $156,383.15.

16. A total interest payment paid to Barkheimers I as of that date was $42,217.38. The amount of principal outstanding and owed to Barkheimers I as of that time was $113,000. The total interest claimed by Barkheimers I, therefore, as of the date of the stipulation was $42,217.38 already paid, plus $43,383.15 claimed by them as additional interest which had not been paid. The interest rate was, therefore, clearly in excess of the 18% allowed by Florida Statute 687.03.

17. Barkheimers I were well aware that the interest

rate which they were charging was well in excess of the 18% allowed by Florida statutes.

18. Pursuant to Florida Statute 687.04 Park Avenue is entitled to judgment to twice the interest paid or $84,434.76.

19. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

WHEREFORE, Park Avenue demands judgment against Barkheimers I in the amount of $84,434.76, plus interest, costs and attorneys fees.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, Esquire, Attorney for Plaintiffs, 316 First Street, West Palm Beach, Florida 33402, and Preston Mighdoll, Attorney for Defendants and Crossclaimants, 3003 South Congress Avenue, Suite 1-A, Palm Springs, Florida, by mail, this 27th day of September, 1982.

O'CONNOR, BAYLOR, CALLAS
& ELLIOTT
8895 North Military Trail
Suite 301-D
Palm Beach Gardens, FL 33410
627-0400

By: _____
Edward F. O'Connor

APPENDIX "D"

MOTION TO DISMISS

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., et al.,

Defendants

MOTION TO DISMISS

The Plaintiffs, through their undersigned counsel, request this Court for an Order dismissing the counterclaim of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., and as grounds therefor say:

1. That the counterclaim in Count I fails to state a cause of action as the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., has waived its right to claim usury against the Defendant, DONALD I. BARKHEIMER, II., and PEGGY BARKHEIMER, pursuant to the Stipulation that was entered into between the Defendant and these Plaintiffs which is the subject matter of the Plaintiffs' Complaint.

2. The counterclaim at Count II should be dismissed for failure to state a cause of action as the Defendant has waived its right to counterclaim for usury pursuant to the Stipulation entered into between the parties which is the subject matter of the Plaintiffs' Complaint. The counterclaim at Count II also fails to attach the promissory notes claimed to be usurious between the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., and the Plaintiffs, DONALD BARKHEIMER and LOUISE BARKHEIMER.

/s/ Signed
Mikel D. Greene
of Counsel

FARISH, FARISH & ROMANI
Denco Bldg., 316 First Street
P.O. Box 3887
West Palm Beach, Florida 33402
Attorneys for Plaintiffs
(305) 659-3500

APPENDIX "E"

ORDER STRIKING AFFIRMATIVE DEFENSES & DISMISSING COUNTERCLAIM

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

ORDER GRANTING MOTION TO STRIKE
AND MOTION TO DISMISS

THIS CAUSE came on to be heard upon the Motion to Strike the affirmative defenses of the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., DREW APGAR and MARK LOSEE, and the Motion to Dismiss the Counterclaim of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC. The Court having heard argument of counsel and being otherwise fully advised in the presimes, it is

ORDERED as follows:

1. That the Motion to Strike affirmative defenses of

the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., DREW APGAR and MARK LOSEE, is hereby granted.

2. That the Motion to Dismiss the Counterclaim of the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., is hereby granted.

DONE AND ORDERED this 21st day of October, 1982.

/s/ Signed
CIRCUIT JUDGE

Copies to counsel

APPENDIX "F"

MOTION FOR SUMMARY JUDGMENT

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, through their undersigned counsel, request this Court for an Order granting summary judgment to the Plaintiffs as to Count I and Count III of Plaintiffs' Complaint and as to the Counter-Claim of the Defendants, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., BAREFOOT MANAGEMENT COMPANY, CAXTON, LTD. and BAREFOOT MAILMAN, LTD., and as grounds therefor say:

1. That there is no genuine issue as to the fact that the Plaintiffs and the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, MARK LOSEE and DREW APGAR, entered into a Stipulation in which the Defendants, PARK AVENUE INVESTMENT &

DEVELOPMENT, INC., MARK LOSEE and DREW APGAR, acknowledged an indebtedness to the Plaintiffs and agreed to convey vacation share units in the Barefoot Mailman time share resort as security for the repayment of this indebtedness. A copy of this Stipulation is attached to the Complaint as Exhibit A.

2. There is no genuine issue as to the fact that at the time this Stipulation was entered into, the Defendants, MARK LOSEE and DREW APGAR, were general partners in Barefoot Mailman, Ltd. and officers of Barefoot Mailman Owners Association which were the two entities that owned the Barefoot Mailman time share resort.

3. There is no genuine issue as to the fact that the Defendants, MARK LOSEE and DREW APGAR, represented to the Plaintiffs that they had authority to enter into this Stipulation and to make the vacation share conveyances which were given to the Plaintiffs for security of the indebtedness admitted under the Stipulation. A copy of the conveyances to the Plaintiffs is attached to the Complaint as Exhibits B and C.

4. There is no genuine issue as to the fact that at the time of Stipulation (Exhibit A) the Defendants, MARK LOSEE and DREW APGAR, had the authority to transfer vacation share conveyances in the Barefoot Mailman as general partners and officers of the owners of the Barefoot Mailman time share resort.

5. There is no genuine issue as to the fact that the Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., defaulted under the terms of the Stipulation and did not repay any of the monies recognized as due the Plaintiffs under the Stipulation.

6. There is no genuine issue as to the fact that under the terms of the Stipulation, the Plaintiffs were to become entitled to all the rights of unit owners under the terms of the conveyances made to them under the Stipulation.

7. There is no genuine issue as to the fact that the conveyances received by the Plaintiffs are properly executed.

8. There is no genuine issue as to the fact that the Defendants, MARK LOSEE and DREW APGAR, represented to the Plaintiffs that the mortgagee of the Barefoot Mailman time share resort, Defendant, CAXTON, LTD., had approved the transfer of the conveyances to the Plaintiffs under the Stipulation.

WHEREFORE, the Plaintiffs are entitled to a Summary Judgment as a matter of law as to Counts I and III of the Plaintiffs' Complaint and as to the Counter-Claim of the Defendants, CAXTON, LTD., BAREFOOT MAILMAN OWNERS ASSOCIATION, BAREFOOT MAILMAN, LTD. and BAREFOOT MANAGEMENT COMPANY, and that the Plaintiffs are the rightful owners of the vacation share units conveyed to them under the Stipulation.

/s/ Signed
Mikel D. Greene
of Counsel

FARISH, FARISH & ROMANI
Denco Bldg., 316 First Street
P.O. Box 3887
West Palm Beach, Florida 33402
Attorneys for Plaintiffs
(305) 659-3500

I HEREBY CERTIFY that a true copy hereof has been furnished EDWARD F. O'CONNOR, ESQ., Suite 301 D, 8895 N. Military Tr., Palm Beach Gardens, Fl., and PRESTON MIGHDOLL, ESQ., Suite 1A, 3003 S. Congress Ave., Lake Worth, Fl. 33461, by mail, this 17th day of November, 1982.

/s/ Signed
Mikel D. Greene
Attorney

APPENDIX "G"

MOTION TO SET ASIDE STIPULATION

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 81-2952 CA(L) O1 J

DONALD I. BARKHEIMER II, and PEGGY A. BARKHEIMER, his wife,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc.,

Defendants

MOTION TO SET ASIDE STIPULATION

The Defendants move this court for an order setting aside the Stipulation entered into in this cause on the grounds that said stipulation is usurious and unenforceable under Florida Statute 687.171.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, Farish, Farish & Romani, Denco Bldg., 316 First Street, West Palm Beach, Fl 33402, and Preston Mighdoll, Kohl, Springer, Springer, Varner, Mighdoll & Salnick, 3003 South Congress Avenue, Suite 1A, Palm Springs, Florida 33461, by mail, this 18th day of November, 1982.

O'CONNOR, BAYLOR, CALLAS
& ELLIOTT
8895 North Military Trail
Suite 301-D
Palm Beach Gardens, Fl 33410
627-0400

By: /s/ Signed
Edward F. O'Connor

APPENDIX "H"

ORDER GRANTING SUMMARY JUDGMENT

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

ORDER GRANTING
PARTIAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard upon the Plaintiff's Motion for Summary Judgment. The Court, having considered the pleadings and the depositions and having heard argument of counsel, finds that there is no genuine issue as to the following material facts:

A Stipulation was entered into between the Plaintiffs and the Defendants, MARK LOSEE, DREW APGAR and PARK AVENUE INVESTMENT & DEVELOPMENT, INC., on September 17, 1981, which is the subject matter of this lawsuit. This Stipulation was entered into between these parties in settlement of litigation brought by the Plaintiffs to recover monies owed to them by the

Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC. As part of this Stipulation, vacation share conveyances of time share unit weeks in the Barefoot Mailman Hotel & Resort were conveyed to the Plaintiffs as security for and satisfaction of the obligation owed to the Plaintiffs by PARK AVENUE INVESTMENT & DEVELOPMENT, INC. and as security for and satisfaction of the Plaintiffs' attorneys' fees. The Defendants, DREW APGAR and MARK LOSEE, had the apparent authority to enter into this Stipulation with the Plaintiffs and had the apparent authority to transfer vacation share unit weeks in the Barefoot Mailman Hotel & Resort to the Plaintiffs pursuant to this Stipulation. The Defendant, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., defaulted under the terms of the Stipulation. Under the terms of the Stipulation, the Plaintiffs became entitled to all the rights of a unit owner in the unit weeks conveyed to them under the Stipulation (See Paragraph No. 5 of the Stipulation). The vacation share conveyances to the Plaintiffs were properly executed by a general partner of the Defendant, BAREFOOT MAILMAN, LTD., and an officer of the Defendant, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. There is an actual controversy as to the rights of Plaintiffs under these vacation share conveyances as the Defendants, BAREFOOT MANAGEMENT COMPANY, BAREFOOT MAILMAN, LTD., and CAXTON, LTD., have demanded that the Plaintiffs redeliver their unit weeks to these Defendants and the Defendant, BAREFOOT MANAGEMENT COMPANY, has denied the Plaintiffs entry to the vacation units. Therefore, it is

ORDERED AND ADJUDGED that the plaintiffs are entitled to a judgment as a matter of law and the Plaintiffs are entitled to all the rights of a unit owner in the

following vacation share units conveyed to them pursuant to the Stipulation dated September 17, 1981. The Plaintiffs, DONALD BARKHEIMER and G. LOUISE BARKHEIMER, are valid unit owners of vacation share Unit 109, weeks 25 through 28; Unit 203, weeks 1 through 5, Unit 214, weeks 1 through 5; Unit 215, weeks 2 through 6; Unit 219, weeks 1 through 3, Unit 222, weeks 9, 10, 51 and 52; Unit 224, week 16 and Unit 303, weeks 1 through 5. The Plaintiffs, JOS. D. FARISH, JR. and ROBERT V. ROMANI, are valid unit owners of Unit 124, weeks 1 and 2; Unit 224, weeks 2, 3 and 10; Unit 324, week 2 and Unit 202, week 9. The Plaintiffs, DONALD I. BARKHEIMER, II., and PEGGY A. BARKHEIMER, are valid unit owners of Unit 203, weeks 2 and 9; Unit 214, week 1 and Unit 215, week 4. The Plaintiff, DENNIS REED, is valid unit owner of Unit 203, week 5 and Unit 209, week 26. Plaintiffs, HARRY RANKER and VIRGINIA RANKER, are valid unit owners of Unit 203, weeks 1 and 6 and Unit 215, weeks 2 and 3. All of the vacation share units referred to above are in the Barefoot Mailman Hotel & Resort in Broward County, Florida.

FURTHER ORDERED and ADJUDGED, that jurisdiction is retained by this Court for the purpose of taxing costs and attorneys' fees upon proper motion and notice, and for the purpose of entering a Final Judgment consistent with the Declaratory Relief granted herein. Plaintiffs' claim for compensatory and punitive damages shall proceed to trial as scheduled.

DONE AND ORDERED, in West Palm Beach, Florida, this 7th day of January, 1983.

/s/ Signed
CIRCUIT COURT JUDGE

Copies to Counsel.

NO. 84-1291

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOL. II — APPENDICES I - V

HAL P. DEKLE, ESQ.
808 Landmark Bank Bldg.
412 Madison Street
Tampa, FL 33602

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

**SPRINGER, SPRINGER,
MIGHDOLL & SALNICK**
3003 South Congress Avenue
Palm Springs, FL 33461

EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010

Attorneys for Petitioners

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APPENDIX "I"

FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

AGREED FINAL JUDGMENT

THIS CAUSE came on to be heard upon the Complaint and Amended Complaint of the Plaintiffs; the Answer, Counterclaim and Crossclaim of the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC.; and the Answer of the Defendants, PARK AVENUE INVESTMENT & DEVELOPMENT, INC., DREW APGAR and MARK LOSEE. The parties have agreed to the following Final Judgment. The Court having considered the Agreed Final Judgment and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. That the Order Granting Partial Summary Judgment previously entered is hereby ratified, approved and incorporated herein.

2. That the Plaintiffs shall have and recover against the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY and BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., the following sums for which let execution issue: The Plaintiffs, ROBERT V. ROMANI and JOS. D. FARISH, JR. shall have and recover $3500.00 against these Defendants; the Plaintiffs, HARRY RANKER and VIRGINIA RANKER, his wife, shall have and recover $1150.00; the Plaintiff, DENNIS REED, shall have and recover $575.00; the Plaintiffs, DONALD I. BARKHEIMER, II and PEGGY A. BARKHEIMER, his wife, shall have and recover $1150.00; and the Plaintiffs, DONALD I. BARKHEIMER and G. LOUISE BARKHEIMER, his wife, shall have and recover $34,700.00. The Defendants, BAREFOOT MAILMAN, LTD., BAREFOOT MANAGEMENT COMPANY, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC. and CAXTON, LTD. shall be jointly and severally liable for the money judgments awarded herein.

3. That jurisdiction is reserved for the taxation of costs against the Defendants to be heard upon proper motion and notice by the Plaintiffs.

4. The Plaintiffs shall not be responsible for any assessments or common expenses which have been incurred or will accrue before the entry of this Final Judgment, relating to those vacation share units declared to be the

property of the Plaintiffs in the Order Granting Partial Summary Judgment incorporated herein.

5. Except as to the amount of damages, Defendants' right to appeal all other issues, including without limiting the generality of the foregoing Order Granting Partial Summary Judgment, is expressly preserved.

6. The Counter-Claim and Cross-Claim of the Defendants, CAXTON, LTD., BAREFOOT MAILMAN, LTD., BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., and BAREFOOT MANAGEMENT COMPANY, are hereby dismissed.

DONE AND ORDERED in Chambers at the Palm Beach County Courthouse, West Palm Beach, Florida, this 31st day of January, 1983.

/s/ W. C. Owen, Jr.
WILLIAM C. OWEN, JR.
Circuit Court Judge

Copies furnished to:

Mikel D. Greene, Esquire, Denco Building, Post Office Box 3887, West Palm Beach, Florida, 33402.
Preston Mighdoll, Esquire, Suite 1-A, 3003 S. Congress Avenue, Palm Springs, Florida, 33461.
Edward F. O'Connor, Esquire, Suite 301-D, 8895 N. Military Trail, Palm Beach Gardens, Florida, 33410.

APPENDIX "J"

MOTION TO SET ASIDE STIPULATION
with affidavit

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., et al.,

Defendants

MOTION TO SET ASIDE STIPULATION

The Defendants move this court for an order setting aside the Stipulation entered into in this cause on the grounds that said stipulation is usurious and unenforceable under Florida Statute 687.171.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, Farish, Farish & Romani, Denco Bldg., 316 First Street, West Palm Beach, Fl 33402, and Preston Mighdoll, Kohl, Springer, Springer, Varner, Mighdoll & Salnick, 3003 South Congress Avenue, Suite 1A, Palm Springs, Florida 33461, by mail, this 22nd day of December, 1982.

O'CONNOR, BAYLOR, CALLAS
& ELLIOTT
8895 North Military Trail
Suite 301-D
Palm Beach Gardens, Fl 33410
627-0400

By: _____
Edward F. O'Connor

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CIVIL DIVISION

NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., et al.,

Defendants

AFFIDAVIT IN SUPPORT OF
MOTION TO SET ASIDE STIPULATION

COUNT I

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues Plaintiffs DONALD I. BARKHEIMER, II, and PEGGY BARKHEIMER, hereinafter referred to as Barkheimers II, and states:

1. On February 20, 1981, in Palm Beach County, Florida, the Barkheimers II loaned to Park Avenue the sum of $20,000. It was agreed between the parties at that time that Barkheimers II would be repaid the $20,000. plus $3,800. interest within fourteen days. An agreement to this effect was prepared but has been misplaced. The effective interest rate for this transaction was 495.3% per annum.

2. Park Avenue did not pay the $23,800. but instead on March 4, 1981, a new note was signed by Park Avenue with the principal amount of $23,800. and additional interest of $4,370. for a total repayable amount of $28,170. This amount was to be repaid within fourteen days. The interest of $4,370. on the principal amount of $23,800. payable within fourteen days comprises an effective interest rate of 478.7% per annum. A copy of said promissory note is labeled Exhibit 1, attached hereto and by reference made a part of this Counterclaim.

3. The $28,170. was not repaid. Instead, on March 17, 1981, a new note was entered into for a principal amount of $28,170. which was the principal and accrued interest on the prior loan plus interest in the amount of $5,381.18, the total amount payable within fourteen days of the date of said note. The total repayable amount at that time was $33,551.18. The interest payment of $5,381.18 on the principal of $28,170. is an effective interest rate of 498% per annum. The total amount repayable in principal and interest became $33,551.18. A copy of said note is labeled Exhibit 2, attached hereto and by reference made a part of this Counterclaim.

4. On March 30, 1981, Park Avenue paid to Barkheimers II the amount of $14,161. On the same date a new note was executed to Barkheimers II in the amount of $28,025.90. A copy of said promissory note is labeled Exhibit 3, attached hereto and by reference made a part of this Counterclaim. At no time did Barkheimers II ever give to Park Avenue any sum in addition to the $20,000. paid on February 20, 1981. The promissory note of March 30, 1981 which is $8,025.90 over and above the $20,000. paid by Barkheimers II when coupled with the $14,161. paid to Barkheimers II comprises a total of $22,186.90 over and

above the $20,000. paid by Barkheimers II, and constitutes interest. This interest was either paid or accrued during the time period from February 20, 1981 to March 30, 1981 and is approximately 1,000% interest per annum.

5. The March 30, 1981 promissory note was the subject of the complaint in Case No. 82-2952 CA(L) 01 J, and was incorporated in the stipulation which is the subject matter of Counterdefendants' complaint in this cause.

6. Barkheimers II were well aware that the interest being charged was well in excess of 18%.

7. Of the $14,161. paid to Barkheimers II, $13,551. constituted interest.

8. Pursuant to the provisions of 637.04 Florida Statutes Park Avenue is entitled to judgment to twice the interest paid or $27,102.

9. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

WHEREFORE, Park Avenue demands judgment against Barkheimers II in the amount of $27,102. plus interest, costs and attorneys fees.

COUNT II

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., hereinafter referred to as Park Avenue, sues DONALD BARKHEIMER and LOUISE BARKHEIMER, hereinafter referred to as Barkheimers I, and states:

10. Barkheimers I loaned to Park Avenue, in Palm Beach County, Florida, the following sums on the following dates:

1/15/81	$75,000.00
1/30/81	10,000.00
2/3/81	21,000.00
2/20/81	5,000.00
2/25/81	22,000.00
Total	$133,000.00

11. Barkheimers I and their assigns Michelle Britton and Paul Britton were repaid the following sums on the following dates:

1/17/81	$ 750.00
2/13/81	11,900.00
2/13/81	1,900.00
2/13/81	1,900.00
2/13/81	1,200.00
2/13/81	800.00
2/13/81	190.00
2/25/81	1,900.00
2/25/81	1,900.00
2/25/81	190.00
3/13/81	5,950.00
3/30/81	11,155.28
3/30/81	3,237.10
3/30/81	4,045.00
4/13/81	8,025.00
4/13/81	2,000.00
4/17/81	2,012.00
5/6/81	3,158.00
Total	$62,217.38

12. Of these payments to Barkheimers I, only $20,000. constituted repayments to principal. The balance constitute interest payments.

13. Between January and April, 1981, Park Avenue executed a series of promissory notes in favor of Barkheimers I.

14. On July 2, 1981, suit was instituted by Barkheimers I against Park Avenue for collection of the various monies claimed to be owed to them pursuant to the above related transactions.

15. On September 10, 1981, the parties entered into a stipulation which is the subject matter of this lawsuit wherein the amount agreed upon to be paid to Barkheimers I was $156,383.15.

16. A total interest payment paid to Barkheimers I as of that date was $42,217.38. The amount of principal outstanding and owed to Barkheimers I as of that time was $113,000. The total interest claimed by Barkheimers I, therefore, as of the date of the stipulation was $42,217.38 already paid, plus $43,383.15 claimed by them as additional interest which had not been paid. The interest rate was, therefore, clearly in excess of the 18% allowed by Florida Statute 687.03.

17. Barkheimers I were well aware that the interest rate which they were charging was well in excess of the 18% allowed by Florida statutes.

18. Pursuant to Florida Statute 687.04 Park Avenue is entitled to judgment to twice the interest paid or $84,434.76.

19. Park Avenue has had to employ the services of the undersigned attorney to represent it in this matter and has agreed to pay him a reasonable fee. There is no

legitimate defense available to Plaintiffs and according to 57.105 FSA, Park Avenue is entitled to attorneys fees.

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me this day personally appeared Mark Losee, who, being first duly sworn, deposes and says:

1. My name is Mark Losee and I am president of Park Avenue Investment & Development, Inc.

2. I have specific knowledge of the facts set forth above and swear that the same are true and correct.

/s/ Signed
Mark Losee

Sworn to and subscribed before me this 20th day of December, 1982.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAY 5, 1984
BONDED (Illegible)

/s/ Signed
Notary Public

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mikel D. Greene, 316 First Street, West Palm Beach, Fl 33401, and Preston Mighdoll, 3003 South Congress Avenue, Suite 1A, Palm Springs, Fl 33461, by mail, this 22nd day of December, 1982.

/s/ Signed
Edward F. O'Connor

March 1, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of Twenty three thousand and Eight Hundred ($23,800.00) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY THREE THOUSAND & EIGHT HUNDRED ($23,800.00) and a profit in the amount of FOUR THOUSAND THREE HUNDRED SEVENTY ($4,370.00) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

March 17, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of TWENTY EIGHT THOUSAND ONE HUNDRED SEVENTY DOLLARS ($28,170.00) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY EIGHT THOUSAND ONE HUNDRED SEVENTY DOLLARS ($28,170.00) and a profit in the amount of FIVE THOUSAND THREE HUNDRED EIGHTY ONE AND 18/100 DOLLARS ($5,381.18) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

March 30, 1981

This will confirm the understanding of the undersigned concerning PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of Palm Beach Gardens, Florida.

DONALD I. BARKHEIMER II & PEGGY

has contributed the sum of TWENTY THREE THOUSAND FIVE HUNDRED FIFTY ONE AND 18/100 ($23,551.18) to PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., for investment and corporate operation. The undersigned DONALD I. BARKHEIMER II & PEGGY shall receive within fourteen (14) days, a sum representing the total cash invested by the undersigned TWENTY THREE THOUSAND FIVE HUNDRED FIFTY ONE AND 18/100 ($23,551.18) and a profit in the amount of FOUR THOUSAND FOUR HUNDRED SEVENTY-FOUR DOLLARS AND 72/100 ($4,474.72) The profits and return of invested capital shall be paid prior to recovery by PARK AVENUE INVESTMENT AND DEVELOPMENT, INC., of any profit.

_____

PARK AVENUE INVESTMENT
& DEVELOPMENT, INC.

BY: /s/ Signed

ATTEST: /s/ Signed

APPENDIX "K"

EXCERPT
of hearing on Motion to Set Aside

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 82-3158 CA(L) O1 E

DONALD I. BARKHEIMER, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT, etc., et al.,

Defendants

_____

EXCERPT OF PROCEEDINGS, TAKEN BEFORE THE HONORABLE WILLIAM C. OWEN, ON TUESDAY, JANUARY 25, 1983.

APPEARANCES:

FARISH, FARISH & ROMANI
316 First Street
Denco Building
West Palm Beach, Florida 33401
by MIKEL D. GREENE, Esquire
for the Plaintiffs

O'CONNOR, BAYLOR, CALLAS & ELLIOTT
8895 North Military Trail
Suite 301 D
Palm Beach Gardens, Florida 33410
by EDWARD F. O'CONNOR, Esquire
for the Defendant Park Avenue

KOHL, SPRINGER, SPRINGER, VARNER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, Florida 33461
by PRESTON MIGHDOLL, Esquire
for the Defendant Barefoot Mailman

Excerpt of proceedings taken before the HONORABLE WILLIAM C. OWEN, in the Palm Beach County Courthouse, West Palm Beach, Florida, on Tuesday, January 25, 1983, beginning at 9:34 a.m.

* * * *

THE COURT: While I'm not able to really draw for you a clear distinction between what would in one instance be a renewal and what in another instance would be a new and separate obligation, I viewed both the Gunn case and the Manilla versus Perez Cobo (phonetic) case as recognizing that it does not need to be—the old obligation—reduced by or with the usurious interest eliminated and simply then, a new obligation in that reduced amount. I think that it can be in whatever amount the parties agree upon, if it is a separate and distinct obligation substituted for the old rather than a mere renewal.

I see, for example, in some of the pleadings somewhere, maybe in the present case as opposed to the original case, but I read that file and I noted a series of notes in which it was alleged that each was essentially a renewal of the former and, of course, they each kept becoming larger or escalating into higher amounts as the new interest was charged. I consider those renewals.

But it seemed to me that the Stipulation in this case falls within the language in the Gunn case that we talked about earlier; of an abandonment

of the old contract and a new one entered into in place of it. And I've put that in this category.

So it seems to me that whatever character of usury was involved, whatever defense of usury was available has been essentially abandoned, vacated—that's not the right word—but essentially is absorbed into the new agreement.

So as to the Motion to Strike the Stipulation in the prior case, that is denied.

* * * *

THE COURT: I may not have stated it too clearly, but I found that the Stipulation was in effect a new obligation, the effect of which was to eliminate any vice that was inherent in any of the prior obligations. And the Stipulation, as such, is enforceable.

I am relying primarily on Gunn versus Dania Bank.

* * * *

MR. O'CONNOR: So it's clear in my mind with regard to the ruling on my Motion, there were two stages: first, where the original agreements that were entered into between the Plaintiff and the Defendant, those were incorporated—correct me if I'm wrong on this—in the promissory notes. Those promissory notes were the basis of the first lawsuit and they were, in turn, incorporated in the Stipulation. That is correct, is it not?

MR. GREENE: Well, they were sued on the Stipulation entered into. I don't know that they're incorporated.

MR. O'CONNOR: What I'm asking is if the Stipulation purges the usury, of if the entered

into, the second set of promissory notes purges the
usury?

THE COURT: I was concerned only with the Stipulation which I viewed as a new, independent and separate obligation in lieu of and in place of prior existing obligations.

* * * *

CERTIFICATE

THE STATE OF FLORIDA
COUNTY OF PALM BEACH

I, Laura M. Freeman, R.P.R. and Notary Public, State of Florida at Large, do certify that the foregoing pages 2 through 4, inclusive, are a true and correct transcription of my stenotype notes of the foregoing excerpt of proceedings.

WITNESS MY HAND AND SEAL this 28th day of January, 1983.

/s/ Signed
LAURA M. FREEMAN, R.P.R.
and Notary Public,
State of Florida at Large.
My Commission expires:
March 24, 1986.

APPENDIX "L"

ORDER
denying Motion to Set Aside Stipulation

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

CASE NO. 82-3158-CA(L) O1 E

DONALD I. BARKHEIMER II, et al.,

Plaintiffs,

vs.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc., et al.,

Defendants

ORDER DENYING MOTION OF
DEFENDANTS, PARK AVENUE, ET AL,
TO SET ASIDE STIPULATION

This case is based in part, if not totally, on a certain written stipulation by which parties to certain prior litigation (in which Park Avenue Investment and Development, Inc., one of the Defendants in this action, was also a Defendant) ostensibly settled, that prior litigation. A copy of the stipulation (the "Stipulation") is attached to the Complaint in this action.

On December 29, 1982, a motion was filed by the counsel for certain of the Defendants seeking an order of the court "setting aside the Stipulation entered into in

this cause (sic) on the grounds that said Stipulation is usurious and unenforceable under Florida Statute 687.171 (sic)". This order is addressed to that motion.

This cause was called for trial on January 25, 1983, the undersigned having been assigned to try the case. The Motion to Set Aside the Stipulation was called up for hearing at the time the case was called for trial. The court having considered the affidavits and the argument of counsel orally announced that the Motion to Set Aside the Stipulation was denied on the finding that irrespective of the usurious nature of the notes which form the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1 (Fla. 1971). The court at that time having announced that it was denying the Motion to Set Aside the Stipulation, requested Edward F. O'Connor, Esq., to prepare and submit a proposed order conforming to the court's announced ruling.

Subsequently, Mr. O'Connor submitted a proposed order, and apparently in anticipation that the order would be entered, accompanied that order with a Motion for Reconsideration and Memorandum of Law in support thereof. Upon receipt thereof, the court determined that further argument should be held on the Motion and entered an order setting the matter for further hearing. In view of the matter being set for further hearing, neither the order submitted by Mr. O'Connor, nor any other order denying the Motion to Set Aside the Stipulation was entered by the court. After the matter was again heard, the court entered

an Order Denying the Motion for Reconsideration but overlooked the fact that a written Order Denying the Motion to Set Aside the Stipulation had never been entered.

Upon consideration of the foregoing matters, it is,

ORDERED AND ADJUDGED that the Motion of Defendants for an Order to Set Aside the Stipulation (Clerk's Docket -121, Record on Appeal Page 150) be, and the same hereby is denied; and it is further,

ORDERED AND ADJUDGED that said denial shall, in order to complete the record in this cause, be considered entered nunc pro tunc to January 25, 1983.

DONE AND ORDERED in Chambers at the Palm Beach County Courthouse, West Palm Beach, Florida, this 8th day of June, 1983, nunc pro tunc as of January 25, 1983.

/s/ Signed
WILLIAM C. OWEN, JR.
Circuit Court Judge

Copies furnished to:
Steven J. Greenwald, Esquire.
Robert Romani, Esquire.
Preston Mighdoll, Esquire.

APPENDIX "M"

FOURTH DISTRICT
COURT OF APPEAL'S DECISION

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1984

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NO. 83-311

BAREFOOT MAILMAN LIMITED,
BAREFOOT MAILMAN MANAGEMENT COMPANY,
BAREFOOT MAILMAN OWNER'S ASSOCIATION,
INC., and CAXTON LIMITED,

Appellants,

v.

DONALD I. BARKHEIMER, II.,
PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellees.

CASE NO. 83-1004.

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II., et al.,

Appellees.

Opinion filed May 9, 1984

Consolidated Appeals from the
Circuit Court for Palm Beach County;
W. C. Williams III and
William C. Owen, Jr., Judge.

Preston Mighdoll of Kohl, Springer,
Springer, Mighdoll & Salnick,
Palm Springs, for appellants
Barefoot Mailman and Caxton Limited.

Robert V. Romani of Farish, Farish & Romani,
West Palm Beach, for appellees
Donald I. Barkheimer, II, et al.

Hal P. Dekle, Tampa, and O'Connor, Bayler and Elliott,
Palm Beach, for Park Avenue Investments, Inc., et al.

PER CURIAM.

Affirmed. *See Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1 (Fla. 1971) and *Sherman v. Field Clinic*, 392 N.E. 2d 154 (Ill. App. 1979).

ANSTEAD, C.J., and GLICKSTEIN, J., concur.

WALDEN, J., dissents without opinion.

APPENDIX "N"

ORDER DENYING MOTION FOR REHEARING

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 83-311.

BAREFOOT MAILMAN LIMITED, et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II, et al.,

Appellees.

CASE NO. 83-1004.

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II, et al.,

Appellees.

July 11, 1984

BY ORDER OF THE COURT:

ORDERED that the Motion for Rehearing and Motion for Rehearing *en banc* filed by Appellant, Park Avenue Investment, etc., et al., are denied as untimely.

ORDERED that the May 24, 1984 Motion for Rehearing and Clarification, filed by Appellants, Barefoot Mailman Limited, et al., is denied.

I hereby certify that the foregoing is a true copy of the original court order.

/s/ Signed
CLYDE L. HEATH,
CLERK

cc: Hal P. Dekle, Esq.
O'Connor, Bayler and Elliott
Preston Mighdoll, Esq.
Robert V. Romani, Esq.

cms

APPENDIX "O"

PETITION FOR CERTIORARI

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO:

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents.

PETITION FOR COMMON LAW CERTIORARI

Petitioners file this Petition for Common Law Certiorari directed to a Fourth District Court of Appeal's

decision dated May 9, 1984, rendered final by an order denying Motion for Rehearing dated July 11, 1984. The Petitioners have simultaneously filed a Notice of Appeal with the Fourth District Court of Appeal based upon the fact that the Fourth District's decision declares invalid a state statute. This Petition seeks review of a decision that is totally at odds with the public policy of the State and with Florida's Criminal Usury Statute, §687.071.

STATEMENT OF THE CASE AND FACTS

Plaintiffs (the "Lenders") loaned money to Defendants (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by The Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (A32). The effective interest rate for the transaction was 495.3% per annum (A32). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (A32, 36). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (A33, 37). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (A32-33, 36-38). These loans are but examples of the many loans made to the Borrowers by the Lenders and now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for nonpayment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed

on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of each of the usurious notes, plus interest (A11-17). The Stipulation also provided that repayment of the usurious notes and interest was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (A11-17).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed in the Hotel and Resort (A1-10). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (A18). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (A14-22). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (A23). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (A24). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (A 25-26). In response, the Borrowers filed a Motion to Set Aside the Stipulation (A27).

The Borrowers also filed, in the original court action in which the Stipulation had been entered, a Motion to Set Aside the Stipulation on the ground that it was usurious and unenforceable under §687.071 F.S. which provides:

> (3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the

> equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.
>
> * * * *
>
> (7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (A27-30).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation for the reason that (A42-43):

> ...irrespective of the usurious nature of the notes which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided by this Court prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of this state,

as dictated by §687.071 (7) refused to allow a usurious loan to be enforced in the courts of this state. In affirming, the Fourth District not only departed from the essential requirements of law, but inherently held §687.071 F.S. invalid as applied to this case, citing to the *GUNN PLUMBING* decision. Judge Walden dissented.

It is Petitioners' position that the Fourth District's ruling departs from the essential requirements of law and therefore must be reversed by this court.

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT'S DECISION DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

ARGUMENT

In 1969 Florida's usury laws were amended to provide in §687.071(7) that an usurious loan would not be an enforceable debt in this state. The trial court and the Fourth District failed to apply the statute, and thus inherently held it invalid as applied to this case. Both courts relied upon the prior decision of this Court in *GUNN PLUMBING*. They should not have because the statute is controlling. The statute was enacted in 1969, and the notes involved in *GUNN PLUMBING* were executed prior to that date, so the statute was not applicable to, nor discussed in, *GUNN PLUMBING*. §687.071 encompasses the public policy of this state as of 1969. The statute protects citizens of this state who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This statutory provision which was passed to

strengthen Florida's usury laws is not subject to waiver.

However even if the *GUNN PLUMBING* decision is applied to the facts of this case, the Fourth District's decision here clearly constitutes an extreme departure from the essential requirements of law.

The *GUNN PLUMBING* decision cited *CORAL GABLES FIRST NATIONAL BANK V. CONSTRUCTORS OF FLORIDA, INC.*, 119 So.2d 741 (Fla. 1960) for the general rule that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are renewed by a new or substituted contract, usury follows and becomes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract. This is not true, however, when the old contract is abandoned and a new one is entered into *free from the vice of the old.* (pp. 746-47).

This Court in *GUNN PLUMBING* quoted its prior decision in *CARTER V. LEON LOAN AND FINANCE CO.*, 146 So. 664 (Fla. 1933):

> If the usurious factor in the first contract is carried into the new contract *in any form*, it is not purged of usury. The old obligation must be given up and abandoned, but, when this is done, and the borrower assents to a new or substituted contract in which he voluntarily agrees to pay the obligation with lawful interest, it is an act of justice forbidden by no principle of public policy, and will be enforced. (pp. 664-6). (Emphasis added).

The Court then stated that the issue before it in

GUNN PLUMBING was not whether every element of usury charged to exist in the original promissory note was abandoned by the subsequent contract of the parties. Rather, the issue before the Court was solely whether the affirmative defense of usury could be waived and, if so, whether such defense was waived by Defendants by virtue of the written stipulation.

The Court in *GUNN PLUMBING* reiterated that usury is a purely personal defense which could be waived. The Court then reviewed the settlement agreement entered into by the parties in that case after default on the usurious notes. The settlement agreement *specifically* provided that the defense of usury raised by the borrower was being withdrawn and that the borrowers admitted they had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. The Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury.

This is not true in the present case. The Stipulation entered into by the parties in no way constituted a waiver of the Borrowers' defense of usury. Unlike *GUNN PLUMBING,* the Stipulation here does not address the Borrowers' defenses (A11-17). For that reason even under the *GUNN PLUMBING* rationale the Borrowers in the present case were not precluded from raising usury.

The controlling issue that must be answered here, which the Court in *GUNN PLUMBING* never reached, is whether the old usury was carried forward into the new contract in any form. It clearly was. The Stipulation entered into by the parties specifically set forth the amount owed each of the lenders *under the old usurious notes* (R11).

The Stipulation then merely set forth a new payment arrangement, but the old obligations continued. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, applying the dictates of this Court in *GUNN PLUMBING* to the facts of this case would require setting aside the Stipulation as being usurious. The new Stipulation was clearly tainted by the old usury.

This Court in *GUNN PLUMBING* also relied upon the fact that the borrowers took no affirmative action to rescind, reform or void the terms of the settlement stipulation. The Borrowers in the present case did so, by filing Motions to Set Aside the Stipulation in both the original action wherein the stipulation was entered, and in the later suit to enforce the Stipulation.

It is clear that the Fourth District's decision departs from the essential requirements of law. The Borrowers request this Court to consider this Petition along with their brief that will be submitted in a simultaneous appeal that is being filed. That appeal is based upon the fact that the Fourth District inherently held §687.071(7) invalid, as applied to this case. The brief in that case will be directed to that issue. The Borrowers further request this Court to consider this Petition as any other possible vehicle for lodging jurisdiction in this Court to review the Fourth District's decision.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 9th day of AUGUST, 1984.

HAL P. DEKLE, ESQ.
Barnett Building
Tallahassee, FL 32301
and
SPRINGER, SPRINGER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, FL 33461
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010

Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "P"

**ORDER DENYING
PETITION FOR CERTIORARI**

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 5, 1984

CASE NO. 65,723

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., ETC., ET AL.,

Petitioners,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Respondents.

The Petition for Common Law Certiorari is hereby denied.

OVERTON, ACTING C.J., ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

A True Copy
TEST:
(SEAL)
/s/ Signed
Sid J. White
Clerk Supreme Court

C
cc: Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll
& Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott

APPENDIX "Q"

NOTICE OF APPEAL

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1984

CASE NO. 83-311

BAREFOOT MAILMAN LIMITED,
BAREFOOT MAILMAN MANAGEMENT COMPANY,
BAREFOOT MAILMAN OWNER'S ASSOCIATION,
INC., and CAXTON LIMITED,

Appellants,

v.

DONALD I. BARKHEIMER, II.,
PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellees.

CASE NO. 83-1004

PARK AVENUE INVESTMENT & DEVELOPMENT,
INC., etc., et al.,

Appellants,

v.

DONALD I. BARKHEIMER, II., et al.,

Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellant appeals to the Florida Supreme Court the decision of this Court dated May 9, 1984 rendered final by the Court's Order of July 11, 1984 denying Appellant's Motion for Rehearings. The nature of the Order is an Order which declares invalid a State Statute.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 9th day of AUGUST, 1984.

HAL P. DEKLE, ESQ.
808 Landmark Bank Bldg.
412 Madison Street
Tampa, FL 33602
and
SPRINGER, SPRINGER,
MIGHDOLL & SALNICK
3003 South Congress Avenue
Palm Springs, FL 33461
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(305) 686-8010

Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "R"

ORDER DISMISSING APPEAL SUBJECT TO REINSTATEMENT

IN THE SUPREME COURT OF FLORIDA

MONDAY, AUGUST 13, 1984

CASE NO. 65,729

District Court of Appeal, 4th District
Nos. 83-311 & 83-1004

BAREFOOT MAILMAN LTD., ET AL.,

Appellants,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Appellees.

It appearing to the Court that the District Court of Appeal, Fourth District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(h)(1), Florida Constitution.

A True Copy
TEST:
(SEAL)
Sid J. White
Clerk Supreme Court

C
cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. William C. Williams, III, Judge

By: /s/ Signed
Deputy Clerk

Hon. William C. Owen, Jr., Judge

Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll & Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott

APPENDIX "S"

MOTION FOR REINSTATEMENT

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

MOTION FOR REINSTATEMENT

Appellants file this Motion for Reinstatement of their appeal pursuant to this Court's August 13, 1984

Order. Appellants seek to demonstrate to the Court that the Fourth District did declare invalid Florida Statute §687.071 and therefore this Court has jurisdiction to hear this appeal.

FACTS

Plaintiffs (the "Lenders") loaned money to Defendants (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by The Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (A32). The effective interest rate for the transaction was 495.3% per annum (A32). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (A32, 36). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (A33, 37). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (A32-33, 36-38). These loans are but examples of the many loans made to the Borrowers by the Lenders and which now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for non-payment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of the total of the usurious notes, plus interest (A11-17). The Stipulation also provided that repayment of the usurious notes and interest

was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (A11-17).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed (A1-10). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (A18). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (A14-22). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (A23). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (A24). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (A25-26). In response, the Borrowers filed a Motion to Set Aside the Stipulation (A27).

The Borrowers also filed, in the original court action in which the Stipulation had been entered, a Motion to Set Aside the Stipulation on the ground that it was usurious and unenforceable under §687.071 F.S. which provides:

> (3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

> (7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (A27-30).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation for the reason that (A42-43):

> ...irrespective of the usurious nature of the notes which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided by this Court prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of this state, as dictated by §687.071 (7) refused to allow a usurious loan to be enforced in the courts of this state. In affirming, the Fourth District not only departed from the essential requirements of law, but inherently held §687.071 F.S. invalid as applied to this case, citing to the *GUNN PLUMBING* decision. Judge Walden dissented.

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT'S DECISION RELYING UPON GUNN PLUMBING HELD §687.071 INVALID.

Prior to the 1980 amendment to Article V, the non-discretionary jurisdiction of this Court included appeals from decisions of district courts of appeal initially and directly passing on the validity of a state statute. As a result of the 1980 Amendment to Article V §3(b)(1) now provides that this Court has jurisdiction to review, by way of appeal, decisions of District Courts of Appeal declaring invalid a state statute. Appellant has been unable to find any post 1980 cases discussing what type of district court activity is sufficient to trigger the invalidity provision. There are two areas of concern. First, is whether a declaration of invalidity "as applied" is sufficient to provide jurisdiction. Cases prior to the 1980 Amendment held that it did. In *SNEDEKER V. VERNMAR, LTD.*, 151 So.2d 439 (Fla. 1963) this Court accepted jurisdiction in a case in which the statute under review was held to be unconstitutional only as applied to the plaintiffs. The court explained:

> ...adjudication...of validity or invalidity in every such case is a decision passing upon the validity of the statute as applied to the facts at bar..., unless, of course, the court ultimately concludes that the terms of the law can be construed as inapplicable to such facts, in which event the constitutional issue is not decided.

It is submitted that invalidity "as applied" would still be sufficient, post 1980, to meet the jurisdictional requirement of this Court. Appellant has been unable to find any post-1980 cases addressing this issue. However, as

recently as 1979, this Court did accept jurisdiction where there was a challenge to the validity of a state, "as applied". In *CROSS V. STATE*, 374 So.2d 519 (Fla. 1979) a defendant claimed that a statute was invalid, not on its face, but as applied to the facts of his particular case. The trial court did not agree that the statute was unconstitutional as applied to the defendant and he was convicted. Upon appeal to this Court (under pre-1980 amendment justification) this Court accepted jurisdiction and upheld the constitutionality of the statute "as applied to *CROSS*".

Under the 1980 amendment there is no language which requires that the district court hold the statute facially invalid in order for this Court to have jurisdiction. Article V (3)(b)(1) only requires that the District Court's decision declare invalid a state statute. A District Court decision can declare a state statute facially invalid or invalid as applied. It is submitted that either falls within the ambit of Article V §3 (b)(1).

The second area of concern is whether the inherency doctrine still applies. Pre-1980 it was not necessary that a written opinion or order expressly rule on the validity of a state statute. An implied or inherent ruling on its validity was sufficient to meet the jurisdictional requirement of this Court. *ROJAS V. STATE*, 288 So.2d 234 (Fla. 1973); *DYKMAN V. STATE*, 294 So.2d 633 (Fla. 1973); *OGLE V. PEPIN*, 273 So.2d 391 (Fla. 1973); *CITY OF LONG BEACH RESORT V. COLLINS*, 261 So.2d 498 (Fla. 1972); *UNITED YACHT BROKERS, INC. V. GILLESPIE*, 353 So.2d 574 (Fla.4thDCA 1977).

In *BUCKMAN V. STATE BOARD OF ACCOUNTING*, 262 So.2d 188 (Fla. 1972) this Court held that the District Court's act of declining, without opinion other

than citations to another District Court case, to grant common law certiorari effectively constituted a passing on the validity of a statute so as to result in appellate jurisdiction in the Florida Supreme Court.

As recent as 1981 this Court has applied the inherency doctrine to a ruling on the validity of a state statute, although under pre-1980 amendment jurisdiction. In *AGULAR V. COMMUNITY GENERAL HOSPITAL*, 396 So.2d 149 (Fla. 1981) this Court held that it had jurisdiction over the plaintiffs' appeal in a medical malpractice action where the circuit court "inherently ruled" on the constitutional validity of the statute governing jurisdiction of mediation panels.

Prior to the 1980 amendment to the Constitution, the Constitutional language specifically provided that the District Court was required to *directly* pass upon the validity of a state statute in order for this Court to have appellate jurisdiction. Regardless of the use of the term "direct", this Court found that the requirement was met if the District Court "inherently" ruled on a statute's validity. Under the post-1980 amendment, the terminology "direct" has been eliminated. Now all that is required is that the District Court declare invalid a state statute. A *direct* declaration in that regard is no longer required. With the elimination of this terminology it can be concluded there was an intent to incorporate the "inherency" doctrine, so that either an express or inherent declaration of invalidity is sufficient.

That this was the intent is evidenced by the fact that within other provisions of the constitutional amendment the terminology "direct" has been retained. For example, in Article V §3(b)(3), conflict jurisdiction requires a decision

of this Court which "expressly and directly" conflicts with another decision. In contrast, there is no requirement of a direct or express declaration of invalidity in Article V §3(b)(1). Therefore, it can be concluded that the inherency doctrine still exists.

As applied to the present case, it is clear that the Fourth District inherently held §687.071(7) invalid as applied to Plaintiffs. In 1969 Florida's usury laws were amended to provide in §687.071(7) that an usurious loan would not be an enforceable debt in this state. The trial court and the Fourth District failed to apply the statute, and thus inherently held it invalid as applied to this case. Both courts relied upon the prior decision of this Court in *GUNN PLUMBING*. They should not have because the statute is controlling. The statute was enacted in 1969, and the notes involved in *GUNN PLUMBING* were executed prior to that date, so §687.071 was not applicable to, nor discussed in, *GUNN PLUMBING*. §687.071 encompasses the public policy of this state as of 1969. The statute protects citizens of this state who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This statutory provision which was passed to strengthen Florida's usury laws is not subject to waiver.

The trial court and District Court *necessarily* held §687.071(7) invalid because that is the only way the Court could have relied upon *GUNN PLUMBING* to the complete exclusion of §687.071. See *DAVIS V. DEPARTMENT OF H.R.S.*, 390 So.2d 1194 (Fla. 1980). The *GUNN PLUMBING* decision cited *CORAL GABLES FIRST NATIONAL BANK V. CONSTRUCTORS OF FLORIDA, INC.*, 119 So.2d 741 (Fla. 1960) for the general rule that the usurious character of a contract must be determined as of

the date of its inception, and if usurious at that time, no subsequent transactions would purge it; that when such contracts were renewed by a new or substituted contract, usury followed and became a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract; but that this was not true, however, when the old contract was abandoned and a new one was entered into *free from the vice of the old.* (pp. 746-47).

This Court in *GUNN PLUMBING* quoted its prior decision in *CARTER V. LEON LOAN AND FINANCE CO.*, 146 So. 664 (Fla. 1933):

> If the usurious factor in the first contract is carried into the new contract *in any form*, it is not purged of usury. The old obligation must be given up and abandoned, but, when this is done, and the borrower assents to a new or substituted contract in which he voluntarily agrees to pay the obligation with lawful interest, it is an act of justice forbidden by no principle of public policy, and will be enforced. (pp. 664-6). (Emphasis added).

The Court then stated that the issue before it in *GUNN PLUMBING* was *not* whether every element of usury charged to exist in the original promissory note was abandoned by the subsequent contract of the parties. Rather, the issue before the Court was *solely* whether the affirmative defense of usury could be waived and, if so, whether such defense was waived by the defendants by virtue of the written stipulation they had voluntarily entered into.

The Court in *GUNN PLUMBING* reiterated that usury is a purely personal defense which could be waived.

The Court then reviewed the settlement agreement entered into by the parties in that case after default on the usurious notes. The settlement agreement *specifically* provided that the defense of usury raised by the borrower was being withdrawn, admitted that the borrowers had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. This Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury.

GUNN PLUMBING would not require the same result in the present case for several reasons. First and most important is the fact that §687.071(7) is now in existence and would prevent the enforcement of the Stipulation entered into in this case. The only issue under §687.071 is whether the debt is based upon usurious interest. If so, it is unenforceable in this State.

Secondly, the Stipulation entered into by the parties in the present case in no way constituted a waiver of the Borrowers' defense of usury. Unlike *GUNN PLUMBING*, the Stipulation here does not address the Borrowers' defenses (A11-17). For that reason, even under the *GUNN PLUMBING* rationale the Borrowers in the present case were not precluded from raising usury.

The controlling issue that must be answered here, and which is controlled by §687.071, and which the Court in *GUNN PLUMBING* never reached, is whether the old usury was carried forward into the new contract in any form. It clearly was. A perusal of the Stipulation entered into by the parties clearly demonstrates that is specifically set forth the amount owed each of the lenders *under the old usurious notes* (R11). The Stipulation then merely set forth

a new payment arrangement, *but the old obligations continued*. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, the new Stipulation was tainted by the old usury. For that reason, §687.071 would require setting aside the Stipulation as being usurious. By reaching the result the Court did in this case, it could only have inherently held §687.071 invalid as applied to these facts.

Accordingly, Appellants request this Court to reinstate this appeal and allow briefs to be filed on the merits.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 24th day of AUGUST, 1984.

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By: /s/ Signed
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APPENDIX "T"

RESPONSE

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

RESPONSE TO MOTION FOR REINSTATEMENT

Respondents respond to Petitioners' Motion for Reinstatement as to PARK AVENUE INVESTMENT &

DEVELOPMENT, INC. MARK LOSEE and DREW APGAR, as follows:

STATEMENT OF THE FACTS

DREW APGAR, an attorney, and MARK LOSEE, a former bank officer, formed PARK AVENUE INVESTMENT & DEVELOPMENT, INC., to develop and convert oceanfront buildings into time-share resorts. The purpose of this Florida corporation was to solicit funds for the conversion of the Barefoot Mailman Hotel in Broward County into the Barefoot Mailman Time-Share Resort. (A-1 through 102, Deposition of Drew Apgar, page 4, line 25, page 6, line 10, and page 71, line 13 through 24).

On or about November 14, 1979, Barefoot Mailman, Ltd., purchased the Barefoot Mailman Hotel for the purpose of converting it into time-share units for sale. Barefoot Mailman, Ltd., transferred this real property to the Barefoot Mailman Owners Association, Inc., on May 20, 1980. This transfer was pursuant to an agreement between Barefoot Mailman, Ltd., and Barefoot Mailman Owners Association, Inc. whereby Barefoot Mailman, Ltd. would develop the Barefoot Mailman Hotel and receive the net sales of the time share units converted. (A-103 through 165, Mark Losee's deposition, page 37, line 18 through 24).

Being that the Barkheimers were clients of Drew Apgar, Drew Apgar solicited them and the other appellees to invest in Park Avenue Investment & Development, Inc. under a profit sharing plan. (A-1 through 102, deposition of Drew Apgar, page 6, line 14 through 19). Park Avenue Investment and Development, Inc. defaulted under this profit sharing plan and executed Promissory Notes to the Appellees for the deficiency due under the profit sharing

investment plan. Park Avenue Investment & Development, Inc. defaulted under these Promissory Notes and five consecutive lawsuits commencing with Case No. 81-2952CA(L)01(J), were brought by the Plaintiffs/Appellees in the Circuit Court of Palm Beach County to recover under these Promissory Notes. (A-1 through 102, deposition of Drew Apgar, page 6, line 20 through 23), (A-192 through 196, a copy of the Complaint filed in one of these five lawsuits).

On September 17, 1981, a Stipulation was entered into between the Appellees and Park Avenue Investment & Development, Inc., Mark Losee, and Drew Apgar, for the settlement of these five consecutive lawsuits. (A-176 through 182) This Stipulation was expressly accepted by the parties, "...as a resolution of the issues necessarily involved in the captioned cases..." It should also be particularly noted that the figures listed in Section 1 of the Stipulation as the total claim of the Plaintiffs were supplied by the Defendant/Appellants and were not inserted at the suggestion of the Plaintiffs/Appellees.

As part of the aforesaid Stipulation, Park Avenue Investment & Development, Inc. agreed to pay money they admitted was owed to the Appellees and secured the repayment of this money by the conveyance of time share units in the Barefoot Mailman Resort. (A-103 through 165, deposition of Mark Losee, page 16, line 17 through page 18, line 1). Park Avenue Investment & Development, Inc. failed to make any of the payments agreed to under said Stipulation. (A-1 through 102, deposition of Drew Apgar, page 40, line 5 through 9). Pursuant to the terms of the Stipulation, in the event that the Defendants defaulted under the terms of the Stipulation, the units conveyed to the Appellees would become effective as satisfaction of the

indebtedness agreed to in the Stipulation. (A-176 through 182, see paragraph 5 of the Stipulation and A-1 through 165, deposition of Drew Apgar, page 40, line 10 through 17).

Vacation share conveyances were then properly executed to the Appellees by a partner of the Barefoot Mailman, Ltd., and an officer of the Barefoot Mailman Owners Association, Inc.

On or about February 15, 1982, Barefoot Management Company was formed for the purpose of managing the Barefoot Mailman Time Share Resort. Defendants have demanded that the Appellees deliver the unit weeks conveyed to them and Barefoot Management Company has denied the Appellees entry to these units.

As the result of these actions by the Appellants, on June 11, 1982, and July 8, 1982, respectively, the Appellees filed a Complaint and Amendment to Complaint in companion case No. 82-3158CA(L)01 E against the Defendants for declaratory relief, injunctive relief and monetary damages. (A-166-174, and A-175-177).

In this companion case, Defendants, Park Avenue Investment & Development, Inc., Drew Apgar and Mark Losee, answered the Appellees' Complaint and alleged affirmative defenses that the Stipulation in question constituted a usurious loan. On October 21, 1982, Honorable Jack H. Cook granted the Appellees' Motion to Strike the aforesaid affirmative defenses of said Defendants. (A-185).

On December 22, 1982, in the same companion case, the Defendants made a Motion to set aside the Stipulation in question on the same grounds they raised in their earlier

Motion, i.e., that it was usurious and unenforcable. On June 8, 1983, Honorable William C. Owen, Jr., entered a nunc pro tunc Order denying the Defendants' Motion to set aside the Stipulation (A-186-187) and on April 15, 1983, Judge Owen entered an Order denying the Defendants' Motion for Reconsideration of this Order (A-188). These two Orders were the basis of the Appellants' Appeal to the Fourth District Court of Appeal. In its Opinion filed May 9, 1984, the Fourth District Court of Appeal affirmed the decisions of the lower Court. (A-189). On July 11, 1984, the Fourth District Court of Appeal denied Appellants' Motion for Rehearing. (A-190). Subsequently, the Appellants filed this Motion for Reinstatement before this Honorable Court.

ARGUMENT

Appellees do not contest whether a declaration of invalidity "as applied" is sufficient to provide jurisdiction or whether the inherency doctrine applies. A decision as to such by this Court is rendered unnecessary since the statute concerned isn't determinative of the case at bar anyway. Even the case relied on so heavily by the Appellants, *Snedekar v. Vernmar, Ltd.*, 151 So 2d 439 (Fla.1963), 441-2, admits this proposition:

> "The adjudication, however, of validity or invalidity in every such case is a decision passing upon the validity of the statute as applied to the facts at bar, unless, of course, the Court ultimately concludes that the terms of the law can be construed as inapplicable to such facts, in which event the constitutional issue is not decided."

Even more recently, this Court in the 1980 decision

of *Davis vs. Department of Health and Rehabilitative Services*, 390 So 2d 1194, (Fla.1980), said that "[e]ven under the inherency doctrine, the constitutional challenge must have been to a controlling statute and the decision as to the statute's validity necessary to the determination of the case." However, it should be noted that the most recent decisions involving the inherency doctrine have carried strong dissents suggesting a re-evaluation as to the application of the doctrine. See *Cross vs. State*, 374 So.2d 519 (Fla.1979) and *Aquilar vs. Community General Hospital*, 396 So.2d 149 (Fla.1981).

Both the Fourth District Court of Appeal and the lower Court based their decisions on the prior Supreme Court case of *Gunn Plumbing, Inc. vs. Dania Bank*, 252 So.2d. 1, (Fla.1971). In *Gunn Plumbing, Inc.*, the Defendants executed and delivered a Promissory Note to the Plaintiff. This Note was not paid at maturity and the Plaintiff then accepted a renewal Promissory Note. When the renewal Note was not paid at its maturity, the Plaintiff instituted suit against the Defendants and the Defendants interposed the defense of usury to this action. This suit was later settled between the parties pursuant to a written stipulation. In this stipulation, the defendants withdrew their civil defenses and admitted that they owed the Plaintiff a certain sum of money, but the Plaintiff agreed to accept a lesser amount of indebtedness.

In *Gunn Plumbing, Inc.*, this Court acknowledged its earlier opinion in *Carter vs. Leon Loan & Finance Co.*, 146 So 664 (Fla.1933) wherein it held that if a contract is usurious at the time of its inception, no subsequent transaction will purge the original transaction of its usurious nature unless the subsequent transaction gives up and abandons every element of usury charged to exist in the

first loan contract. However, in *Gunn Plumbing, Inc.*, this Court held that it was not its area to determine whether or not every element of usury charged to exist in the original contract was abandoned by the subsequent contract between the parties because "...Usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute." *Gunn Plumbing, Inc.* at 4.

As was noted by this Court: "the usury statute in this State does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts." *Gunn Plumbing, Inc.* at 4. Relying on this reasoning, this Court in that case held that the District Court of Appeal was correct in holding that the defense of usury had been waived by the defendants when they entered into the joint stipulation with the Plaintiff. Just as in the *Gunn Plumbing, Inc.* case, in the instant case appellants waived any defense of usury they might have had to the original Note executed and delivered to the Appellees when they entered into the joint stipulation in question. Although the Appellants would have this Court believe otherwise, such waiver language does exist in the stipulation between the parties. In this stipulation it is provided that, "...the following agreements shall be accepted by the parties *as a resolution of the issues necessarily involved in the captioned cases and any judgments flowing therefrom.*" (emphasis added; see stipulation attached to Appellees' appendix A-178 through 184). It should be noted that two Circuit Court Judges, Judge Owen and Judge Cook, as well as the Fourth District Court of Appeal, agreed that such language in the stipulation constituted a waiver of all of the defenses that Appellants may have had, including usury.

In the Appellants' Motion, opposing counsel has raised tactical arguments with the hope of convincing this Court that the *Gunn Plumbing, Inc.* case is not controlling in the instant case. First, the appellants argue that since Florida Statute §687.071 was enacted after the stipulation entered into the *Gunn Plumbing, Inc.* case, this statute supercedes and impliedly overrules this Court's holding in *Gunn Plumbing, Inc.* The Appellees respectfully submit to this Court that the enactment of Florida Statute §687.071 does not affect the holding in the *Gunn Plumbing, Inc.* case. This Court's decision of *In re: Estate of Blankenship,* 122 So 2d. 466 (Fla.1960), 470, stated that:

> "It does not follow as a matter of course that a court decision interpreting a statute is rendered inapplicable ipso facto by a subsequent amendment to the statute. The effect of the decision as binding precedent must in each instance be determined by the nature and effect of the amendment to the statute as well as by the breadth of the court decision and the questions decided in it, as those questions may be applicable to the statute after amendment."

Appellants are impressed by the language contained in paragraphs 7 of §687.071 which states: "(7) No extension of credit made in violation of any other provisions of this section shall be an enforcable debt in the Court of this State."

One should note, however, that §687.07 Florida Statutes (1965), which was the statute in effect at the time the stipulation was entered into in the *Gunn Plumbing, Inc.* case had a provision similar to that found in §687.071. In §687.07, Florida Statutes (1965), which is attached to the Appellees' appendix at A-191, provides in relevant part

that if the lender shall violate that criminal usury statute, the lender: "...shall forfeit the entire sum, both principal and interest, to the party charging such usurious interest, and shall be deemed guilty of a misdemeanor,...". Since the lender forfeits his entire principal and interest under §687.07, this has the same effect as the lender being unable to enforce his debt in the Courts pursuant to §687.071. Therefore, since this Court was charged with the knowledge of §687.07 at the time it decided the *Gunn Plumbing, Inc.* case, it is the Appellees' position that the enactment of §687.071 in no way affected this Court's decision in that case.

The Appellees also assert that the instant case is not a situation where you are dealing with consumer loan between an unknowledgable borrower and a shrewd, unconscionable lender. Initially, this was an investment situation wherein the borrowing corporations were acting through two other officers and/or directors who were a former officer and a lawyer; whereas the investors/lenders were average consumers. Therefore, since the borrowers had the superior knowledge in this case, this is not the type of transaction which the usury statutes were enacted to prohibit. This is not a case where an innocent person was exposed to the device of a stipulation imposed by the grasping hand of the greedy lender as the Appellants would have this Court believe.

Appellees would again point out that the stipulation in question was entered into to settle their lawsuit against the Appellants and settlement agreements are binding upon the parties and upon the Court and they are highly favored by the Courts. *Dorson v. Dorson,* 393 So.2d, 632 (Fla.4th DCA 1981). In *Gunn Plumbing, Inc.,* this Court held that:

> "This Court is committed to the rule that it not only approves but favors stipulations and agreements on the part of litigants and counsel designed to simplify, shorten or settle litigation and save cost to the parties, and the time of the Court, and when such stipulations or agreements are entered into between parties, litigants or their counsel, the same should be enforced by the Court, unless good cause is shown to the contrary." *Gunn Plumbing, Inc.* at 4.

Therefore, as alluded to in the quote above and as clearly stated by this Court in *State vs. Bruno*, 104 So.2d 588 (Fla.1958), 590, "[t]he burden is on the Appellant to show that this Court has jurisdiction to act in this cause which it presents." The Appellees contend, however, that the Appellants have not carried their burden. All the Appellants have merely done is to allege that such invalidation occurred in the District Court of Appeal's decision, without proving such.

> "The fact that a Complaint prays for a decree directly passing on the validity of numerous State statutes and construing alleged controlling provisions of the Florida constitution does not ipso facto mean that any decree entered in such a cause has directly passed on the validity of a State statute or construed a contolling provision of the Constitution." *Green vs. Peters*, 140 So.2d 601 (Fla.2d DCA 1962), at 602.

Additionally, "it is fundamental that an Order or decree comes to the Appellate Court clothed with the presumption of correctness, and before reversal of an Order or decree may be had, the burden rests on Appellant to clearly demonstrate error." *Southern National Bank of Fort Walton Beach vs. Young*, 142 So 2d 788 (Fla.1st DCA 1962), at 789.

As the argument above points out, the Fourth District Court of Appeal did not err in its ruling. The decision was based on this Court's decision of *Gunn Plumbing, Inc.* Therefore, the statute argued never comes into play whatsoever. The stipulation entered into was valid and as such, the Fourth District Court of Appeal was correct in affirming the lower Court's Order.

As pointed out by this Court in *Mournier vs. State*, 178 So 2d 714, (Fla.1965), the Supreme Court is compelled to dispose of the appeal without considering the validity of the aforementioned statute, if the case can be dismissed on any other ground. Clearly such a situation exists with the case at bar.

CONCLUSION

Therefore, it is the Appellees' contention that this Court is without jurisdiction to hear the present Motion for Reinstatement and that the basis for invoking jurisdiction pursuant to the Florida Constitution, Article V, Section 3 (b)(1) has not been met. Accordingly, Appellees request this Court to decline reinstatement.

Respectfully submitted,

/s/ Signed

Robert V. Romani
Of Counsel

FARISH, FARISH & ROMANI
P. O. Box 3887
West Palm Beach, FL 33402
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Motion for Reinstatement of Appellees on Case No. 65,729 and Appendix thereto has been furnished O'Connor, Bayler and Elliott, 8895 No. Military Trail, Suite 301D, Palm Beach Gardens, FL 33410; and Edna L. Caruso, Esq., P.A., Suite 4-B, Barristers Bldg., 615 Forum Place, West Palm Beach, Florida, 33401; and Hal P. Dekle, Esq., 412 Madison Street, Suite 808, Tampa, FL 33602, Attorneys for Appellants, by mail, this 10th day of September, 1984.

/s/ Signed
Robert V. Romani
Attorney

APPENDIX "U"

REPLY

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 65,729

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Appellants,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Appellees.

REPLY

Appellants file this Reply to Appellees' Response to Motion for Reinstatement as follows:

Appellees acknowledge that a declaration of invalidity as applied and the inherency doctrine are vehicles by which the court has jurisdiction over the present appeal. Appellees simply contend that §687.071 F.S. was not held unconstitutional in the present case. Rather, Appellees argue that the Fourth District applied GUNN PLUMBING, INC. V. DANIA BANK, 252 So.2d 1 (Fla. 1971) and held that the defense of usury had been waived by appellant when they entered into the joint stipulation. Appellees argue that this Court's decision in GUNN PLUMBING turned upon the fact that "the usury statute in this state does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts". However, what Appellees overlook is that the statute existing at the time GUNN PLUMBING was decided, §687.07 F.S. (1965) did *not* have the effect of invalidating usurious contracts, but the statute under which the present case was decided, §687.071(7) does in fact invalidate usurious contracts entered into in this state. Therefore, the very basis for the decision in GUNN PLUMBING no longer exists.

Appellees argue that the new statute is no different from the old statute because the latter provided for forfeiture of the principal and interest of a usurious loan. However, as shown by GUNN PLUMBING, the forfeiture provision was subject to being waived by the borrower. Waiver is not possible under §687.071(7) which provides that a usurious contract is not enforceable in this state. As a matter of public policy the statute has the effect of invalidating usurious contracts.

It is submitted that the District Court necessarily

held §687.071(7) invalid because that is the only way the court could have come to the conclusion that it did and that is the only way the court could have relied upon GUNN PLUMBING to the complete exclusion of §687.071. If §687.071 had been applied, the usurious loans would be unenforceable and judgment should have been entered for Appellants.

Appellants request this Court to reinstate this appeal and allow briefs to be filed on the merits.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT V. ROMANI, ESQ., Denco Building, 316 First Street, West Palm Beach, FL 33401; and O'CONNOR, BAYLER AND ELLIOTT, 8895 North Military Trail, Suite 301-D, Palm Beach Gardens, FL 33410, this 20th day of SEPTEMBER, 1984.

HAL P. DEKLE, ESQ.
Barnett Building
Tallahassee, FL 32301
and
SPRINGER, SPRINGER,
MIGHDOLL & SALNICK
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EDNA L. CARUSO, P.A.
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305-686-8010

Attorneys for Petitioners

By: /s/ Signed
EDNA L. CARUSO

APPENDIX "V"

ORDER DENYING
MOTION FOR REINSTATEMENT

IN THE SUPREME COURT OF FLORIDA

MONDAY, NOVEMBER 5, 1984

CASE NO. 65,729

District Court of Appeal, 4th District
Nos. 83-311 & 83-1004

BAREFOOT MAILMAN LTD., ET AL.,

Appellants,

vs.

DONALD I. BARKHEIMER, II, ET AL.,

Appellees.

On consideration of the motion for reinstatement filed by attorneys for appellants, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

The motion to consolidate filed by attorneys for appellants is hereby denied.

A True Copy
TEST:
(SEAL)
Sid J. White
Clerk Supreme Court

C
cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. William C. Williams, III, Judge

By: /s/ Signed
Deputy Clerk

Hon. William C. Owen, Jr., Judge

Edna L. Caruso, Esquire
Hal P. Dekle, Esquire
Springer, Springer, Mighdoll & Salnick
Robert V. Romani, Esquire
O'Connor, Bayler & Elliott

NO. 84-1291

FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR. and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOS. D. FARISH, JR., ESQ.
R[illegible]ERT V. ROMANI, ESQ.
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305-659-3500

Attorneys for Respondents

A B[illegible] 61-5555

BEST AVAILABLE COPY

24pp

QUESTIONS PRESENTED

Respondents take issue with the question presented by the Petitioners (Page i) and respectfully submit that the questions presently before this Court are as follows:

1) Should certiorari be granted where it appears from the record that:

a. The decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds; and

b. Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court.

2) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute where it appears from the record that:

a. No usury violation had occurred; or alternatively,

b. The Petitioners waived any usury defense they may have had.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that the Petitioners' Petition for Writ of Certiorari be denied. It appears from the record that the decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds. Specifically, the record shows that the Petitioners were not denied equal protection of the law as concerns Florida's Criminal Usury Statute, §687.071, because no usury violation had occurred, or alternatively, the Petitioners waived any usury defense they may have had. Further, the Petitioners did not present a federal question in the Florida courts and are first raising it in this Court.

In this Brief, the following symbols will be used:

(PET.BR.)	Petitioners' Brief
(PET.APP.)	Petitioners' Appendix
(RES.APP.)	Respondents' Appendix

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in the Petition (PET.BR. 4-8) is accepted in part and rejected in part by the Respondents. There are certain factual matters which were omitted and of which this Court should be aware.

First, it is important that this Court be aware of who the parties are in this case and how they interrelate. Two of the Petitioners, Drew Apgar, an attorney, and Mark Losee, a former bank officer, formed Park Avenue Investment & Development, Inc. to develop and convert ocean front buildings into time share resorts. The purpose of this Florida corporation was to solicit funds for the conversion of the Barefoot Mailman Hotel in Broward County, Florida, into the Barefoot Mailman Time Share Resort.

On or about November 14, 1979, Barefoot Mailman, Ltd., purchased the Barefoot Mailman Hotel for the purpose of converting it into time share units for sale. Barefoot Mailman, Ltd., then transferred this real property to the Barefoot Mailman Owners Association, Inc. on May 20, 1980. This transfer was pursuant to an agreement between Barefoot Mailman, Ltd., and Barefoot Mailman Owners Association, Inc., whereby Barefoot Mailman, Ltd., would develop the Barefoot Mailman Hotel and receive the net sales of the time share units converted.

Being that the Respondents, the Barkheimers, were clients of attorney Drew Apgar, he solicited them and the other Respondents to invest in Park Avenue Investment & Development, Inc., under a profit sharing plan. Park Avenue Investment & Development, Inc., then defaulted under this profit sharing plan and executed promissory notes to the Respondents for the deficiency due under this profit sharing investment plan. Park Avenue Investment & Development, Inc., also defaulted under these promissory notes and this resulted in the Respondents initiating several lawsuits to recover under these promissory notes.

On September 17, 1981, a stipulation was entered into between the Respondents and Park Avenue Investment & Development, Inc., Mark Losee and Drew Apgar, for the settlement of these lawsuis. (PET.APP.A—Stipulation attached as an exhibit to the Complaint). This stipulation was expressly accepted by the parties, "...as a resolution of the issues necessarily involved in the captioned cases...". It should also be noted that the figures listed in Section I of the Stipulation, which are the total amounts owed to each Respondent, were supplied by the Petitioners and were not inserted at the suggestion or insistence of the Respondents.

As part of the aforesaid stipulation, Park Avenue Investment & Development, Inc., agreed to pay monies they admitted were owed to the Respondents and secured the repayment of this money by the conveyance of time share units in the Barefoot Mailman Resort. Park Avenue Investment & Development, Inc., then failed to make any of the payments agreed to under this stipulation. Time share units were then properly executed and conveyed to the Respondents by a partner of the Barefoot Mailman, Ltd., and an officer of the Barefoot Mailman Owners Association, Inc.

On or about February 15, 1982, Barefoot Management Company was formed for the purpose of managing the Barefoot Mailman Time Share Resort. Petitioners then demanded that the Respondents deliver the time share units conveyed to them and the Barefoot Management Company denied the Respondents entry to these units.

As a result of these actions by the Petitioners, the Respondents then filed another lawsuit for declaratory relief, injunctive relief and monetary damages. (PET.APP.A).

The remaining Statement of the Case, as presented by the Petitioners (PET.BR., page 5, 2nd paragraph—page 8), is accepted by the Respondents. The Respondents, however, take exception to the Petitioners' statement that they were denied equal protection of the law because the Fourth District Court of Appeal found that the common law set forth in *GUNN PLUMBING, INC. V. DANIA BANK*, 252 So.2d 1 (Fla.1971) is controlling rather than §687.071, Florida Statutes. The Respondents submit, as will be more fully expressed in their argument, that the enactment of Florida Statutes §687.071 did not impliedly

overrule or change the holding in the *GUNN PLUMBING* case. The purging of usury and waiver of usury defense principles enumerated in the *GUNN PLUMBING* case still apply after the enactment of §687.071, as the Court found they applied to the instant case, and accordingly, the Petitioners were not denied equal protection of the law.

ARGUMENT

1) Should certiorari be granted where it appears from the record that:

a. The decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds; and

b. Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court.

This Court has consistently held that it will not review a State Court judgment based upon an adequate and independent non-federal ground, even though a federal question may be involved and perhaps wrongly decided. *CENTRAL LAND COMPANY V. LAIDLEY*, 159 U.S. 103, 40 L.Ed. 91 (1895). Insofar as a decision turns upon questions of state law it is controlling and this Court's power of review is restricted to federal questions. *CHESAPEAKE & OHIO RAILWAY COMPANY V. PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA*, 242 U.S. 603, 61 L.Ed. 520 (1917).

In *BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY V. HILL*, 281 U.S. 673, 74 L.Ed. 1107 (1930), this Court stated:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." *BRINKERHOFF-FARIS* at 680.

In addition to limiting its jurisdiction to the review of federal questions, this Court has often held that it must affirmatively appear from the record that the federal question was specially set up or claimed in the state court and was acted upon by the state court adversely to the claimant, otherwise jurisdiction does not exist. *CENTRAL LAND COMPANY V. LAIDLEY, supra.*

Based upon the foregoing holdings by this Court, the Respondents respectfully submit that this Court should not exercise its certiorari jurisdiction because the Petitioners failed to present a federal question in the Florida Courts and, in fact, a federal question does not exist in this case.

Petitioners state (PET.BR. Page 3) that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). (RES.APP.A). Relying on that statute, the Petitioners claim that the federal question in this case is whether they were denied equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution, by the Florida Fourth District Court of Appeal's finding

that the common law set forth in the *GUNN PLUMBING* case controlled, rather than §687.071, Florida's Criminal Usury Statute, which statute was enacted subsequent to the *GUNN PLUMBING* decision. (PET.BR. Page 7).

In response, Respondents first point out to this Court that the Petitioners did not raise this Fourteenth Amendment federal question in the Florida Courts. Specifically, the Petitioners did not argue to the trial court, the Fourth District Court of Appeal or the Supreme Court of Florida, that applying the *GUNN PLUMBING* case to the case at bar, rather than applying the subsequently enacted Florida Criminal Usury Statute, would be denying them equal protection. In fact, this federal question is first being raised before this Court in the Petitioners' Brief.

Additionally, as will be more fully expressed in the next section of the Respondents' Argument, the Respondents assert that, in fact, a federal question does not exist at all in the instant case. In order for the Petitioners to successfully show that they were denied equal protection concerning the enforcement of §687.071, Florida Statutes, they would have to cite some authority for the proposition that this statute impliedly overruled or changed the *GUNN PLUMBING* decision. The Petitioners have cited no such authority because the purging of usury and the waiver of usury defense principles enumerated in the *GUNN PLUMBING* case are still good and valid legal principles in the State of Florida and these principles were totally applicable to the facts in this case.

Based upon the foregoing facts and authorities, since a federal question was not raised in the Florida State Courts and was not decided by these State courts, the Respondents would point out that the considerations

governing review on certiorari set forth in Rule 17.1(b) and (c), Revised Rules of the Supreme Court of the United States (RES.APP.B), are not met in this case. Further, since a federal question does not exist in the present case, this Court does not have jurisdiction to exercise its certiorari jurisdiction pursuant to U.S.C. §1257(3). (RES.APP.A) as the Petitioners have asserted.

> 2) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute where it appears from the record that:
>
> a. No usury violation had occurred;

Respondents support their position that the Florida Courts did not deny Petitioners equal protection by applying common law principles rather than the Florida's Criminal Usury Statute, by arguing that the Petitioners waived any usury defense they may have had at the time they entered into the subject Stipulation or, alternatively, there was no usury violation by the Respondents in this case.

First, with respect to the question of whether a usury violation occurred in the instant case, Respondents point out to this Court that the primary purpose of the usury law is to protect needy borrowers by penalizing unconscionable money lenders. *STUBBLEFIELD V. DUNLAP,* 4 So.2d 519 (Fla.1941). The four requirements for a usurious transaction under Florida law are:

> "(1) There must be a loan express or implied;
>
> (2) An understanding between the parties that

> the money lent shall be returned;
>
> (3) That for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid as the case may be; and
>
> (4) There must exist a *corrupt intent* to make more than the legal rate for the use of the money loaned." *DIXON V. SHARP,* 276 So.2d 817, 819 (Fla.1973).

The Petitioners admit in their own brief that the usury statute, "...protects Florida citizens who may not be in a position to protect themselves when dealing with lenders." (PET.BR. Page 8).

The Respondents assert that the case at bar is not a situation where you are dealing with a consumer loan between an unknowledgeable needy borrower and a shrewd unconscionable money lender. Initially, this was an investment situation wherein the borrowing corporations (Petitioners) were acting through two of their officers and/or directors who were a lawyer and a former bank officer; whereas the investors/lenders (Respondents) were average consumers. Therefore, since the borrowers had the superior knowledge in this case, this is not the type of transaction for which the usury statutes were enacted to prohibit. Also, although it may be argued that the initial investment arrangement constituted a loan and therefore met the first requirement of a usury transaction as cited above, it is doubtful that the subsequent Stipulation entered into between the parties to settle their losses would constitute a loan transaction.

The Respondents also maintain that the fourth requirement of a usurious transaction is clearly not met in

this case. In this regard, the Florida Supreme Court held in *DIXON V. SHARP* that:

> "Florida courts recognize that usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than the law permits, *but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent.* ... To work a forfeiture under the statute the principal must knowingly and willingly charge or accept more than the amount of interest prohibited. ... The difference between a lawful transaction and a usurious one, therefore, is *the difference between 'good faith' and 'bad faith'.*" *DIXON* at 820 and 821.

Respondents submit that the record before the Florida Courts fails to show even the slightest bit of evidence of a corrupt intent by the Respondents in these transactions. With respect to the initial investment transaction, it was the Petitioners who had the superior knowledge. As far as the Stipulation is concerned, the Respondents assert the fact that it was the Petitioners who supplied the agreed payoff amounts in Paragraph 1 of the Stipulation and these figures were not by the suggestion of the Respondents. Accordingly, there was no "corrupt intent" by the Respondents in the instant case. The Respondents were not aware that they may have been violating any usury law and they were only acting in good faith throughout their entire dealings with the Petitioners.

Lastly, with respect to this issue, Respondents would point out that the Stipulation in question was entered into to settle their lawsuit against the Petitioners and both sides were represented by counsel. Settlement

agreements are binding upon the parties and upon the court and they are highly favored by the Florida courts. *DORSON V. DORSON,* 393 So.2d 632 (Fla. 4 DCA 1981).

b. The Petitioners waived any usury defense they may have had.

The Respondents' second and main argument in support of their position that the Petitioners were not denied equal protection of the law in the instant case is the fact that the Petitioners waived any usury defense they may have had when they entered into the subject Stipulation. Since the Florida Supreme Court held in the case of *GUNN PLUMBING, INC. V. DANIA BANK,* 252 So.2d 1 (Fla.1971), that the affirmative defense of usury could be waived in circumstances such as those presented in the instant case, the Florida Courts did not deprive the Petitioners of equal protection of the law by applying the common law principles in that case rather than the Florida Criminal Usury Statute. As the following argument maintains, the *GUNN PLUMBING* decision was not impliedly overruled by nor is it contradictory to the provisions of Florida's Criminal Usury Statutes, §687.071.

As indicated by the ruling of the trial court and by the opinion of the Fourth District Court of Appeal, the case at bar was decided upon the authority of the Supreme Court of Florida's decision in the *GUNN PLUMBING* case. In *GUNN PLUMBING, INC.,* the defendants executed and delivered a promissory note to the plaintiff. This note was not paid at maturity and the plaintiff then accepted a renewal promissory note. When the renewal note was not paid at its maturity, the plaintiff instituted suit against the defendants and the defendants interposed

the defense of usury. This suit was later settled between the parties pursuant to a written stipulation. The defendants defaulted under the stipulation and the plaintiff again instituted suit. In this later suit, the defendants filed their Answer and attempted to raise the affirmative defense of usury.

In *GUNN PLUMBING, INC.*, the Florida Supreme Court acknowledged its earlier opinion in *CARTER V. LEON LOAN & FINANCE CO.*, 146 So. 664 (Fla.1933), wherein it held that if a contract is usurious at the time of its inception, no subsequent transaction will purge the original transaction of is usurious nature unless the subsequent transaction gives up and abandons every element of usury charged to exist in the first loan contract. However, in *GUNN PLUMBING, INC.*, the Court held that it was not necessary to determine whether or not every element of usury charged to exist in the original contract was abandoned by the subsequent contract between the parties because, as held by the Court:

> "...Usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute...moreover, usury being a purely personal defense which may be availed of, or waived, at the election of the party aggrieved, it has no especial claims upon the indulgence and favor of the court, but must be disposed of upon the same principles and in the same manner as other defenses." *GUNN PLUMBING, INC.* at 4.

The court further held that:

> "The usury statute in this State does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts." *GUNN PLUMBING, INC.* at 4.

Relying on this reasoning, in that case the Florida Supreme Court held that the District Court of Appeal was correct in holding that the defense of usury had been waived by the defendants when they entered into the joint stipulation with the plaintiff.

Just as in the *GUNN PLUMBING* case, in the instant case the Petitioners waived any defense of usury they may have had to the original notes when they entered into the joint Stipulation in question. Although the Petitioners would have this Court believe otherwise (see PET.BR., page 9, footnote No. 1) such waiver language does exist in the Stipulation between the parties. In this Stipulation it is provided that, "...the following agreements shall be accepted by the parties *as a resolution of the issues necessarily involved in the captioned cases* and any judgments flowing therefrom." (PET.APP.A, emphasis added). It should be noted that the trial court agreed that such language in the Stipulation constituted a waiver of *all* of the defenses that Petitioners may have had, including usury.

The Petitioners also attempt to distinguish the *GUNN PLUMBING* case by arguing that in the present case, unlike *GUNN PLUMBING*, the old usury was carried forward into the new contract. (PET.BR., Page 9, footnote No. 1). Respondents submit that the foregoing fact is not a distinguishing one because the very holding of the *GUNN PLUMBING* case is that it is no longer necessary for a court to determine whether or not every element of

usury charged to exist in the original contract was abandoned by the subsequent contract between the parties if the court finds that the borrower had waived his right to claim a usury defense.

Lastly, in an apparent effort to convince this Court that the *GUNN PLUMBING* case is not controlling in the instant case, the Petitioners argue that since §687.071, Florida Statutes, was enacted in 1969 and was therefore not in force at the time the promissory notes were executed in the *GUNN PLUMBING* case, then this statute supersedes and impliedly overrules the Florida Supreme Court's holding in *GUNN PLUMBING, INC.* (PET.BR. Page 8).

In response to this argument, the Respondents respectfully submit to this Court that the enactment of §687.071 in 1969 does not affect the holding in the *GUNN PLUMBING* case. Petitioners are impressed by the language contained in subsection 7 of §687.071, which states:

> "(7) No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state."

Section 687.07, Florida Statutes (1965), which was the criminal usury statute in effect at the time the promissory notes were entered into in the *GUNN PLUMBING* case, had a provision similar to that found in §687.071(7). This former criminal usury statute provided, in relevant part, that if the lender shall violate that criminal usury statute, the lender:

> "...Shall forfeit the entire sum, both the principal

> and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor,..." (RES.APP.C).

Since the lender forfeits his entire principal and interest under §687.07, this has the same effect as the lender being unable to enforce his debt in the courts pursuant to the new statute, §687.071. Therefore, since the Florida Supreme Court was charged with the knowledge of §687.07 at the time it decided in *GUNN PLUMBING, INC.* that the usury defense could be waived, Respondents submit that enactment of §687.071 in 1969 in no way affected the Florida Supreme Court's decision in that case.

In the case of *IN RE: ESTATE OF BLANKENSHIP*, 122 So.2d 466 (Fla.1960), the Florida Supreme Court held that:

> "It does not follow as a matter of course that a court decision interpreting a statute is rendered inapplicable ipso facto by a subsequent amendment to the statute. The effect of the decision as binding precedent must in each instance be determined by the nature and effect of the amendment to the statute as well as by the breadth of the court decision and the questions decided in it, as those questions may be applicable to the statute after amendment." *BLANKENSHIP* at 470.

Based upon the foregoing, the Respondents respectfully submit that the public policy of the State of Florida still is, even after the change in the Criminal Usury Statute in 1969, that usury is a purely personal defense which can be waived. The Florida Supreme Court's holding in the *GUNN PLUMBING* case is still good law in the State of Florida and this was confirmed by the rulings of the Fourth

District Court of Appeal and the Supreme Court of Florida in the instant case.

CONCLUSION

The record before the Florida Courts shows that the Respondents did not violate Florida's Criminal Usury Statute, or alternatively, the Petitioners waived any usury defense they may have had by entering into the subject Stipulation. Accordingly, the Florida Courts did not deprive the Petitioners of the right to equal protection by applying the waiver principles of the *GUNN PLUMBING* case rather than Florida's Criminal Usury Statute. Further, the orders and opinions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds and the Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

28 U.S.C. §1257(3)

§1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX "B"

RULE 17.1(b) AND (c), Revised Rules of the Supreme Court of the United States

RULE 17. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX "C"

SECTION 687.07, FLORIDA STATUTES (1965)

687.07 FORFEITURE AND PENALTY IN CASE OF EXCESSIVE INTEREST OR CHARGES.—

Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and the interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days.

(5)

SUPREME COURT OF THE UNITED STATES

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., ET AL. *v.* DONALD I. BARKHEIMER, II, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

No. 84–1291. Decided May 13, 1985

The motion of respondents for attorneys' fees and costs is denied. The petition for writ of certiorari is denied.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

I agree that we should deny the petition for a writ of certiorari, but I would also grant respondents' motion for costs and fees. This petition is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim, and on this record I believe that the purpose of the petition is to delay collection of a debt. This use of the Court's processes should subject the attorney who filed the petition to the sanction of Rule 49.2 of this Court.[1]

Park Avenue Investment & Development, Inc., was formed to develop and convert ocean front buildings into time share resorts. Petitioners solicited the respondents to invest in Park Avenue under a profit sharing plan. Park Avenue later defaulted on its obligations under the profit sharing plan. It then executed a series of promissory notes to the respondents for the deficiencies due under the plan, but defaulted on the notes as well. Respondents initiated five separate lawsuits to collect on the promissory notes. On September 17, 1981, the parties entered into a stipulation for the settlement of the lawsuits. The stipulation set out the

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[1] Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

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amounts petitioners owed to respondents and established a timetable for repayment. When Park Avenue failed to make any of the payments under the stipulation, respondents attempted to foreclose on their debts, but petitioners prevented them from doing so.

Respondents then filed suit in state court. In response to a motion for summary judgment filed by respondents, petitioners moved to set aside the stipulation on the ground that it was usurious and unenforceable under Florida's criminal usury statute, Fla. Stat. § 687.071(7) (1983). The trial court denied petitioners' motion to set aside the stipulation, granted respondents' motion for summary judgment and, a few weeks later, entered judgment for respondents. The court based its decisions on *Gunn Plumbing, Inc.* v. *Dania Bank*, 252 So. 2d 1 (Fla. 1971), in which the Florida Supreme Court held that "usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute." *Id.*, at 4. The trial court held that the parties' stipulation constituted a waiver of whatever usury defense petitioners may have had to the promissory notes.

Petitioners appealed to the District Court of Appeals. That court affirmed in a *per curiam* order, simply citing *Gunn Plumbing*, *supra*, and *Sherman* v. *Field Clinic*, 74 Ill. App. 3d 21, 392 N. E. 2d 154 (1979). Petitioners then filed a petition for a writ of certiorari in the Florida Supreme Court and at the same time attempted to take a direct appeal to that Court, invoking its appellate jurisdiction on the obviously meritless ground that the Court of Appeals had held § 687.071(7) invalid as applied. See generally Fla. Const. Art. V, § 3(b)(1). The State Supreme Court denied certiorari and dismissed the appeal. Petitioners then filed a motion for reinstatement of the appeal. The Florida Supreme Court denied this motion.

Petitioners next filed their petition for a writ of certiorari in this Court, asserting that the state courts' failure to apply

§ 687.071(7) infringed their rights under the Equal Protection Clause of the Fourteenth Amendment. Petitioners' equal protection "argument" is raised here for the first time. In reviewing judgments of state courts, of course, we do not consider constitutional arguments that were not properly presented in the state courts.

Moreover, the claim is patently frivolous. Besides the wholly conclusory assertion that the decisions of the state courts have violated petitioners' right to equal protection, the arguments contained in the petition concern only matters of state law, principally that the trial and appellate courts erred in applying *Gunn Plumbing*, *supra*. Although there are colorable arguments that *Gunn Plumbing* is distinguishable from petitioners' case, there is nothing in *Gunn Plumbing* or in the facts of this case to indicate that the application of *Gunn Plumbing* here was arbitrary or even surprising. There is no allegation that *Gunn Plumbing* has not been applied in similar cases.[1] Hence there is no basis whatsoever for petitioners' assertion that they have been denied equal protection. Indeed, it seems clear to me that this petition is but the latest step in a series of actions designed solely to delay respondents' foreclosure on their loans. Such an abuse of the judicial process should not be tolerated. See *Talamini* v. *Allstate Insurance Co.*, 470 U. S. ——, —— (1985) (STEVENS, J., concurring) ("[I]f it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.").

Respondents have moved for an award of costs and fees for their expenses in responding to this frivolous petition. I

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[1] Nor could any such allegation be made; *Gunn Plumbing* has been followed consistently. See, *e. g.*, *Munilla* v. *Perez-Cobo*, 335 So. 2d 584 (Fla. App. 1976), cert. denied, 344 So. 2d 325 (Fla. 1977). See also *Morgan Walton Properties, Inc.* v. *International City Bank & Trust Co.*, 404 So. 2d 1059, 1062 (Fla. 1981).

would grant the motion to the extent of awarding respondents $5000.00 against Hal P. Dekle, Esq., petitioners' counsel, pursuant to this Court's Rule 49.2.